



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023 -004255
UI-2023-004256
UI-2023-004257

First-tier Tribunal No:
HU/59163/2022, LH/00467/2023
HU/59166/2022, LH/00462/2023
HU/59165/2022, LH/00465/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 26 June 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MRS ROMOKE ABEJIDE
MR GEORGE ABEJIDE
MISS OLUWATAYO ABEJIDE
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr. Slatter, counsel, instructed by Barclay Solicitors

For the Respondent: Mr E. Banham, Senior Presenting Officer

Heard at Field House on 30 May 2024

DECISION AND REASONS

1. The Appellants, who are Nigerian citizens, made an application for leave to remain on the basis of their private life in the UK. In a decision (“the Decision”) issued following a hearing on 12 April 2023 a First-tier Tribunal (“the FtT”) dismissed the Appellants’ appeals of the Respondent’s refusal of their applications. Following a hearing before me on 24 November 2023 I decided in a decision issued on 11 December 2023 that the FtT’s decision should be set aside. I directed that the appeal should be reheard in the Upper Tribunal, although various findings made by the FtT were to be retained. That decision is attached as an annexe hereto.

2. Mrs Romoke Abejide and Mr George Abejide are the parents of Miss Oluwatayo Abejide. They made their application for leave to remain together with Michael, Oluwatayo's brother. Both Oluwatayo and Michael are adults (aged 29 and 25 respectively). Michael was granted leave to remain on the basis that as at the date of the application he was less than 25 years old and had spent more than half his life in the UK.

Appeal Rights and the Burden of Proof

3. It is for the Appellants to prove on the balance of probabilities that they each have a family or private life to which Article 8 ECHR could apply: EH Iraq [2005] UKIAT 00062. If Article 8 is engaged a balancing exercise is required as decided in the case of Quila [2011] UKSC45.

4. In this case the preserved findings include one that the Appellants have a family life with Michael. It is that family life upon which the Appellants rely.

5. It was accepted by Mr Slatter that the Appellants cannot satisfy the requirements of the Immigration Rules for leave to remain.

6. If an appellant does not meet the requirements of the Immigration Rules, the public interest normally lies in refusing leave to enter or remain. The exception is where refusal results in unjustifiably harsh consequences for the appellant or a family member such that refusal is not proportionate.

The Issue

7. The issue in dispute is whether the Respondent's decision to refuse the Appellants' application is a proportionate interference with their private and family lives in the UK. In particular, the issue is whether, when the law is correctly applied to the facts found by the FtT, the refusal results in unjustifiably harsh consequences for the Appellants.

The Evidence

8. The Appellants continue to rely upon the bundle of evidence produced for the FtT hearing.

9. The hearing before me proceeded by way of submissions only.

The Appellants' case

10. Mr Slatter relied upon his skeleton argument which in summary says as follows:

(1) the Appellants rely upon the principles set out in R (Razgar) v SSHD [2004] UKHL 27 to say that the Respondent's failure to address the implications of Michael's grant of leave to remain was a public law error that vitiated the decision. Furthermore, the Respondent wrongly asserted that there is no family life between the Appellant and Michael. Accordingly the Respondent's decision is not in accordance with the law;

(2) these two factors also mean that the weight to be attributed to the public interest in effective immigration controls is reduced;

(3) account should be taken of the fact that the Appellants all speak English and are financially independent of the state;

- (4) the little weight to be attributed to Oluwatayo Abejide's private life must be interpreted in the light of Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC); and
- (5) weight should be given to the fact that Michael is on the path to settlement.

11. In his submissions Mr Slatter also relied upon the case of PD and others (Article 8-conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). He submitted that Michael's position in this case is stronger than that of the child in PD because he has an absolute right to remain in the UK which is not based on a reasonableness assessment.

12. Mr Slatter submitted that the Tribunal is expected to make a decision with reference to what is likely to happen in the real world given the circumstances of the family. Therefore it must be assumed that the Respondent's decision would lead to severance of family life between the Appellants and Michael. It is Michael's human rights which would be affected if the Appellant's are required to leave and that is specifically addressed under GEN.3.2 of the Immigration Rules where reference is made to "other family member". The attempt by Mr Banham to limit the weight to be given to the family life of the Appellants with Michael should be resisted. The absence of an expert report does not mean that the family life should be found to be limited given their continued cohabitation and the FtT's finding that their relationship was closer than normal.

13. Mr Slatter submitted that it was, however, doubtful that GEN.3.2 was applicable in this case as the Respondent did not consider the Appellants' application under Appendix FM. He recognised though that it had not been claimed that there was an error of law in the FtT's decision applying GEN.3.2. In any event, even if the Appellants do not meet the conditions to apply GEN.3.2 their appeal should be allowed outside the Immigration Rules.

The Respondent's case

14. Mr Banham recognised that the preserved findings included one that family life was engaged, but submitted that applying Gaudeep Kaur v SSHD [2023] EWCA Civ 1353 it was necessary to identify the weight to be given to each of the relevant factors.

15. The parents had used their visit visas to bring the children to the UK and in so doing had undermined effective immigration controls, the public interest in which should be given considerable weight; although Mr Banham recognised that the Appellants, as children, could not be held responsible for the actions of their parents. While relocation of the Appellants to Nigeria would be distressing for the family, the FtT had been clear that there is no evidence to show that it would have more significant impact on any of the Appellants and Michael. Michael could maintain contact electronically and visit. The ability of the Appellants to maintain financial support on return to Nigeria was important. Oluwatayo Abejide has obtained a degree in the UK and there is family support in Nigeria for the Appellants. While Michael is on the route to settlement that is far from certain. He can choose to remain in the UK or could access education in Nigeria. The R (on the application of Agyarko) v SSHD [2017] UKSC 11 threshold is not met. PD is notably different in that it considered the position involving a 14 year old child.

My decision

16. I start by setting out the preserved findings from the FtT decision which are not disputed:

(1) the original four applications made by the Appellant and Michael relied solely upon their private life in the UK given that they were adults who were long-term overstayers and therefore the risk was of removal together. In the Respondent's refusal there is no reference to the grant of leave to Michael. Family life outside the Immigration Rules was, however, considered by the Respondent both in the refusals and in the reviews;

(2) there was in effect a plan executed by Romoke and George Abejide, when George Abejide lost his job as an officer in a bank, to use their existing multiple visit visas to migrate to the United Kingdom with their minor children (Oluwatayo and Michael), initially funded by the sale of a property in Nigeria, in order to give the children a better life, including access to education in the UK. Oluwatayo and Michael arrived here as visitors in August 2009 and were in school here by September 2009. The family first rented their present accommodation from 27 September 2010. These actions undermined effective UK immigration control as their visit visas were not a route to settlement and did not allow study or work. However, insofar as this is an adverse matter, it goes principally to the situation of the parents. Their minor children cannot be blamed for their parents' decisions made when they were minors;

(3) both children have amassed significant qualifications whilst in the UK. Oluwatayo would return to Nigeria with a UK degree to assist her in finding work. Oluwatayo obtained her degree without family financial support. The proximity of Michael's family is therefore not necessary for his academic success;

(4) the relationships between the Appellants and Michael are somewhat closer than usual relationships between adult family members. They enjoy family life within the terms of Article 8 together. However, they could remain in contact if the Appellants return to Nigeria and Michael remained in the UK and Michael would be able to visit them. If the whole family, including Michael, returns to Nigeria there would be no impact upon their family life together. Given the closeness of the family's relationships it is reasonably likely that Michael would follow his family to Nigeria;

(5) the FtT was not given a full account of the family's activities in the UK or why George Oluwatayo could not work in branches of his church in Nigeria;

(6) there are sources of support for the Appellants whether from their own activities or from others either within Nigeria or from outside if they were to return there. Romoke Abejide's mother and siblings remain in Nigeria;

(7) the main issue relating to George Abejide's diabetes is the cost of medication rather than access, and cost would be alleviated by the available support;

(8) the family's church activities could continue in branches of their church in Nigeria;

(9) the Appellants will have retained significant knowledge of Nigeria;

(10) there would not be very significant obstacles to the Appellants' reintegration into Nigeria;

(11) if Michael relocated to Nigeria he would relinquish his place at the beginning of a 10 year path to settlement; and

(12) Romoke and George Abejide have always known that the family had overstayed, were not entitled to work, and were not on a route to settlement

17. Article 8 (1) is therefore engaged for each of the Appellants in relation to their private life and family life in the UK.

18. Mr Slatter submitted that the Respondent's failure to address the family life implications of the grant of leave to remain to Michael and the existence of family life between the Appellants and Michael was a failure to consider all relevant

circumstances such that the Respondents' refusal should be found not to be in accordance with the law. However, I do not agree. The Upper Tribunal in Charles (human rights appeal: scope) [2018] UKUT 00089 decided that a person whose human rights claim turns on Article 8 would not be able to advance any criticism of the Respondent's decision making under the Immigration Rules, unless that person's circumstances were such as to engage Article 8 (2).

19. Consequently, the fact that the FtT has found there to be family life between the Appellants and Michael and that the Respondent had failed to consider that family life does not in itself cause the decision to be other than in accordance with the law. To determine that, the Immigration Rules and the Article 8 proportionality exercise must be carried out, as I shall now do.

20. To strike a fair balance between the competing public and individual interests involved, I adopt a balance sheet approach weighing the public interest factors against the Appellants and the family and private life factors in the Appellants' favour. That exercise is required by the encapsulation of Article 8 under the Immigration Rules in GEN.3.2 where the reference to unjustifiably harsh consequences is found.

21. Mr Slatter introduced a submission challenging the application of GEN.3.2 in this case. That challenge was not previously made when the Appellants sought to appeal the FtT decision. However, in any event, as the FtT found, the Respondent addressed the ability of the Appellants to rely on their family life in the UK. That means that I am satisfied that GEN.3.2 should be addressed by me as Parliament's encapsulation of Article 8 in the Immigration Rules. If I were not to do so though, the exercise outside the Immigration Rules would be fundamentally the same in this case.

22. In assessing the proportionality of the Respondent's decision I identify the weight to be given to each of the factors to be taken into account in the balance sheet approach, as directed by the Court of Appeal in Gaudeep Kaur.

23. It is accepted by the Appellants that the Immigration Rules (save for GEN.3.2) are not met. This is a significant factor to take into account because there is substantial weight in the public interest which lies in the maintenance of effective immigration controls.

24. Little weight can be given to Ramoke and George Abejide's private life developed in the UK. Section 117B Nationality, Immigration and Asylum Act 2002 (as amended) also requires that I give little weight to Oluwatayo's private life, but the case of Ruppiah v SSHD [2018] UKSC 58 makes clear that there can be some variance in that "little weight". Given the fact that Oluwatayo cannot be blamed for her parents' actions in bringing her to the UK and that she spent formative years in the UK, I conclude that the weight given to her private life is at the somewhat higher end of the "little weight" spectrum.

25. There are few obstacles to the Appellants returning to Nigeria given the findings regarding their ability to access financial and family support in Nigeria. Oluwatayo can use her qualifications to seek work in Nigeria and there is no reason why her parents could not also seek work there. Both Romoke and George Abejide have completed several training courses in the UK. The family can access their church in Nigeria. Consequently there is little to be added to the Appellants' side of the balance sheet in relation to reintegration circumstances.

26. The ability of the Appellants to speak English and their lack of reliance on the state is only neutral in the proportionality exercise.

27. As PD and other cases make clear I should carry out this exercise in the light of the likely circumstances. The preserved finding is that Michael is likely to join the Appellants given the closeness of their relationship. That would mean that family life between him and the Appellants would not be affected. I recognise that there is some weight in the fact that Michael would give up his path to settlement, but as Mr Banham submitted, settlement is not a certainty. The weight to be given to this consideration is significantly less than would be given if he was about to be granted settlement rights or was a British citizen.

28. I therefore conclude that the total weight on the balance sheet on each Appellant's side is considerably less than the significant weight I must give to the public interest in effective immigration controls. Given the facts in this case and the outcome of the balance sheet weighing, I am entirely satisfied that there are not circumstances which would render refusal of the application for leave to remain a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the Appellants or Michael.

29. Furthermore there are no circumstances in this case which warrant further consideration outside the Immigration Rules (including GEN3.2).

30. For the avoidance of doubt, even if I were to consider Michael choosing to remain in the UK there would be no difference to my ultimate conclusion that the appeals do not succeed. While the Respondent's decision would interfere with the family life between the Appellants and Michael, the weight to be attributed to that family life must be considered alongside the other assessments of the circumstances in this case which I have set out above. In addition, it must be recognised that Michael is a young man of some 25 years of age and there is little reason why he could not remain in the UK, maintaining contact with his parents and sister and visiting them in Nigeria. Consequently, the weight of the Appellants' family life with Michael together with the limited weight given to other factors in the Appellants' favour would still not outweigh the significant weight given to the maintenance of effective immigration rules. The Respondent's decision would still not result in unjustifiably harsh consequences for Michael of the Appellants.

31. Accordingly I must dismiss the appeals.

Notice of Decision

27. The appeals are dismissed on human rights grounds.

28. As the appeals are dismissed no fee award is appropriate.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12/06/2024

Annex



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023 -004255

First-tier Tribunal No: HU/59163/2022
and HU/59166/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MRS ROMOKE ABEJIDE
MR GEORGE ABEJIDE
MISS OLUWATAYO ABEJIDE
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr. J. Plowright, counsel, instructed by Barclay Solicitors

For the Respondent: Mr Wain, Senior Presenting Officer

Heard at Field House on 24 November 2023

DECISION AND REASONS

- 1.** The Appellants, who are Nigerian citizens, made an application for leave to remain on the basis of their private life in the UK. In a decision (“the Decision”) issued following a hearing on 12 April 2023 First-tier Tribunal Judge Randall (“the Judge”) dismissed the Appellants’ appeals of the Respondent’s refusal of their applications. In a decision dated 28 September 2023 First-tier Tribunal Judge Bibi granted permission to appeal on the basis that there was an arguable error law in the test and threshold applied by the Judge in applying Article 8.
- 2.** Mrs Romoke and Mr George Abejide are the parents of Miss Oluwatayo Abejide. They made their application for leave to remain together with Michael,

Oluwatayo's brother. Both Oluwatayo and Michael are adults. Michael was granted leave to remain on the basis that as at the date of the application he was less than 25 years old and had spent more than half his life in the UK.

The FTT Decision

3. The Judge decided that it had not been shown that the Appellants would face very significant obstacles to reintegration in Nigeria if they returned there.
4. The Judge turned to consider GEN3.2 and decided that Article 8 was engaged in relation to the family life between the three Appellants and Michael. The removal of the Appellants would be a significant interference with that family life if Michael remained in the UK. The Judge then said that the key issue was whether that interference would be disproportionate. The Judge referred to *Agyarko* and the need for exceptional circumstances, assessed by reference to whether they are "unjustifiably harsh". The Judge then found that it was relevant to consider the impact on Michael and the fact that if he relocated to Nigeria to join his family he would relinquish the route to settlement on which he had embarked, in considering "undue harshness". The Judge went on to address the factors required by s117B NIAA 2002 and the overstaying of Mr and Mrs Abejide in particular.
5. The Judge then considered the Appellants' family life, again referring to the test of "unjustifiably harsh consequences". The Judge addressed the effect on Michael's private life of staying alone in the UK and concluded that the proximity of family was not needed for Michael's academic success. Considering their family life further the Judge stated that it would not be a disproportionate interference with the Appellants' family life or have "unduly harsh" consequences. The Judge also concluded that it would not be "unduly harsh" for Michael to go to Nigeria with the Appellants.

The Appellant's Grounds of Appeal

6. In summary, the Appellant's grounds of appeal are as follows:
 - a. Having regard to the Judge's findings about family life between the Appellants and Michael it was arguably *Wednesbury* unreasonable for the Judge to find that the 'exceptional circumstances' test was not met;
 - b. The Judge was in breach of *MNM (Surendran guidelines for Adjudicators) Kenya** [2000] UKIAT 00005;
 - c. The finding that Michael would join the Appellants in Nigeria was not a finding open to the Judge on the balance of probabilities;
 - d. The Judge made inconsistent findings in relation to the ability of the Appellants and Michael to keep in touch and for Michael to visit Nigeria;
 - e. The Judge set too high an evidential threshold when referring to the lack of expert evidence about the effect on Michael of the Appellants returned to Nigeria;
 - f. The Judge failed to apply what had been said about not blaming children for their parents' poor immigration history;
 - g. The Judge did not properly weigh or analyse the nature of Michael's rights vis a vis his leave to remain in the UK;
 - h. The Judge incorrectly referred to the test of undue harshness and unduly harsh which applies in the deportation context;

- i. The Judge failed to give adequate reasons when concluding that separation of the family would not have unjustifiably harsh consequences.

2. In his submissions Mr Plowright helpfully focused on Ground (h) recognising that the other grounds were ancillary. He submitted that in referring to a test of undue harshness/unduly harsh the Judge had elevated the test to that applying when considering a deportation. Furthermore, the Judge had not carried out a *Hesham Ali* balance sheet approach and it was therefore difficult to understand and assess the balancing exercise carried out beyond the use of the words “unduly harsh”.

The Response of the Respondent

3. A Rule 24 response had been provided by the Respondent. In that the Respondent opposed the Appellant’s application and submitted that the Decision was well reasoned and carefully considered. The challenges were generally no more than a disagreement with the factual findings. Any reference to unduly harsh consequences is not materially erroneous since it is plain and clear that the FTTJ was not proceeding on the basis that this was a deportation appeal, not least by appropriate regard to relevant and established Article 8 jurisprudence at [52-58] of the Decision on multiple occasions.

My decision

4. The Decision is a very detailed and careful analysis of the facts. Most of the Appellants’ grounds of appeal are little more than a challenge to the fact finding carried out by the Judge. However, the Judge has unfortunately referred to the wrong test for exceptional circumstances under GEN3.2 on three occasions and those occasions are in the heart of the proportionality analysis. Although the Judge refers to the correct test in both the introduction to the GEN 3.2 consideration and in a separate reminder of the law the test which is said to be used in the actual exercise is the wrong one – the test applied in the context of deportations with connotations of an elevated threshold. The Supreme Court in *HA (Iraq)v Secretary of State for the Home Department* [2022] UKSC 22 approved the reference to the test of undue harshness as involving something severe or bleak and at paragraph 42 of the decision said:

“...the level of harshness which is “acceptable” or “justifiable” in the context of the public interest in the deportation of foreign criminals involves an “elevated” threshold or standard. It further recognises that “unduly” raises that elevated standard “still higher” - i.e. it involves a highly elevated threshold or standard.”

5. That is therefore a higher threshold than the test of unjustifiably harsh consequences provided in GEN3.2.

6. I have considered whether the wrong references should be treated as a mere slip. In *Alam* the Court of Appeal considered there to be just such a “slip” where the FtT incorrectly referred to “unduly harsh” on one occasion and correctly referred to “insurmountable obstacles” on six occasions. This is not equivalent. It is not just a matter of how many times the wrong test was referred to, but the places in the Decision where that error occurred. And the parties, particularly the losing party, are entitled to feel confident that the Judge applied the correct test in law when deciding the appeal.

7. Furthermore, I agree with Mr Plowright that the error is material where the weight given to each of the factors considered in the proportionality exercise is not stated. The recently published case of *Kaur v Secretary of State* [2023] EWCA Civ 1353 emphasises the need for the FtT to identify the weight given to the circumstances which inform the balance sheet approach required in conducting the proportionality exercise. While the Decision addressed a multitude of factors it did not identify the weight to be given to them in the that exercise.
8. I therefore consider that there was a material error of law in the Decision. This therefore means that the Decision must be set aside.
9. Given the nature of the errors of law a rehearing is required. I have applied the guidance in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) and have had regard to the extent of fact finding which will be required as well as the extent of loss of the two-tier decision-making process if the decision is retained. I have decided that in this case the limited amount of fact finding required means that the rehearing should take place at the Upper Tribunal.
10. The Appellant's grounds of appeal raise several other challenges. However, I conclude that those are in essence no more than disagreement with the fact finding and weighing of evidence by the Judge. As such I am satisfied that none are successful and the findings of fact at paragraphs 44-53, 55-57 and 59-60, save in relation to any assessment of undue harshness are retained.

Notice of Decision

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside but with the findings made at paragraphs 44-53, 55-57 and 59-60, save in relation to any assessment of undue harshness, retained.
2. The decision will be re-made at a resumed hearing on a date to be notified to the parties. This will take place in the Upper Tribunal.
3. In the circumstances, full and detailed skeleton arguments need to be produced for the resumed hearing setting out the case for each party.
4. I therefore DIRECT that:

No later than 7 days before the hearing, the parties shall file and serve skeleton arguments setting out in full their legal submissions in relation to the ability of the Appellant to qualify for protection

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11/12/2023