



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal nos: **IA 52484, 90, 93, 98-13**

THE IMMIGRATION ACTS

At **Field House**
on **25.07.2014**

Decision signed:
25.07.2014
sent out: 30.07.2014

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Gabriel Toyin OGUNBAYEJE & 3 others

appellants

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: Mr Hakeem Allison, solicitor

For the respondent: Mrs Rhona Petterson

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal against the decision of the First-tier Tribunal (Judge Vincent Fox), sitting at Richmond on 30 April 2014, to allow an appeal against refusal of indefinite leave to remain as a points-based system [PBS] migrant, on the basis of five years' stay, by a citizen of Nigeria, born 10 February 1968, and his dependent wife and children. The appellant has been in salaried employment as a minister of religion.

2. Mr Allison conceded for the appellant before the judge that he couldn't succeed under the terms of the Immigration Rules themselves, owing to a gap in his qualifying residence. This, as the judge found, was owing to events outside the appellant's control, concerned with how the Home Office had dealt in the past with his church employer's registration as a sponsor. The judge however went on to allow the appeal, first (paragraph 29) on the basis that the decisions were "not in accordance with the Immigration Rules", owing to failure to apply the relevant policy guidance

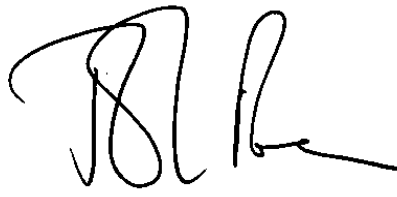
(23 January 2014); he went on to recognize that this might involve the application of a discretion by the Home Office, and concluded (30)

It therefore follows at minimum that the matter should be returned to the respondent for her to consider her decisions in the light of my findings.

3. Both sides before me were agreed that this last part of the judge's decision should stand, and that his decision to allow the appeal under the Immigration Rules must be quashed. Of course the policy guidance formed no part of those: see *Pankina* [2010] EWCA Civ 719 if authority were required. The only difference lay in what should be done about the judge's further decision (at 31 - 34) to allow the appeal under article 8 of the Human Rights Convention, which he did for the sole reason that the difficulties over the continuity of the appellant's qualifying residence were outside his control, but within that of the Home Office, so that his removal would be disproportionate to the legitimate purpose of immigration control.
4. Mr Allison argued that the judge was entitled to make this part of the decision, for the reasons he gave. Judges are certainly entitled, and encouraged to deal with any article 8 grounds, even where they allow an appeal under the Rules, as an alternative basis for their decision. However, that assumes a valid decision under appeal in the first place, which can be dealt with on its merits, one way or the other.
5. The difficulty in this case is that the jurisdiction to allow an appeal where there has been a failure to follow policy guidance, depends on the jurisdiction to allow it as 'not in accordance with the law' (see [Abdi \[1995\] EWCA Civ 27](#)). There are exceptional cases, where it is so clear that applying the policy guidance can have only one result, that the appeal has to be allowed outright forthwith on the basis that no other result would be in accordance with the Rules; but it has not been argued that this is one of them.
6. The discretion to dispense with the strict requirements of the Rules remains the Secretary of State's, and the basis for the exercise of that discretion was the real ground for the judge's allowing the appeal under article 8. In those circumstances, he should have confined himself to the part of his decision set out at paragraph 30: the right way to say it would have been that the decision on the applications remained for the Secretary of State to consider, on the basis of the judge's findings of fact and the policy guidance of 23 January 2014.

Home Office appeal allowed

Appellants' appeals allowed, to the extent that the decisions on their applications remain to be considered by the Secretary of State

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(a judge of the Upper
Tribunal)