Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15574/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th April 2015	**On 30th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR OLANUNLE OGUNGBAYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr John Waithe of Counsel
For the Respondent: Mr Steve Whitwell, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 15th May 1984. He appealed against the decision of the Respondent dated 17th March 2014 to refuse his application for further leave to remain in the United Kingdom and to remove him by way of directions

under Section 10 of the Immigration and Asylum Act 1999. The Appellant's appeal was allowed at first instance by Judge of the First-tier Tribunal Hunter sitting at Hatton Cross on 23rd October 2014. The Respondent appeals with leave against that decision. As a consequence the matter came before me initially as an appeal by the Respondent but as I have for the reasons which I set out below set aside the decision of the First-tier Tribunal and have remade the decision in this case I shall continue to refer to the parties as they were known at first instance for the sake of convenience.

2. The Appellant entered the United Kingdom in 2003 as a family visitor at the age of 19. After his visit visa expired he remained in this country and has had no leave to remain since then. The Appellant's sister Ms Kofowrorola Ogungbayi, also a Nigerian citizen born in Nigeria on 6th June 1994 came to the United Kingdom six months after the Appellant in July 2003 and she too has remained ever since. In February 2012 both the Appellant and his sister Ms Ogungbayi submitted applications for leave to remain in the United Kingdom. In March 2013 Ms Ogungbayi's application was granted but the Appellant's was refused. It was the refusal of the Appellant's application which gave rise to the present proceedings. The reason for the delay in deciding the Appellant's application after that of his sister was because the Respondent made an initial decision on the Appellant's case on 27th March 2013 but it was withdrawn and a new decision made on 17th March 2014.

3. The Appellant's case was that whilst in the United Kingdom he had obtained A levels before going to university where he had studied Chemical Engineering. He had been unable to obtain a job because of his immigration status. He was supported by his aunt Ms Kate Abu, a British citizen who provided accommodation and food. She did not give evidence at first instance, the Appellant telling the Judge that Ms Abu was unable to attend the hearing because she had to go to work.

The Proceedings at First Instance

4. As the Appellant's application for leave to remain was made on 1st November 2011 that is to say prior to 9th July 2012, Judge Hunter held following the case of **Edgehill [2014] EWCA Civ 402** that the Appellant's appeal fell to be determined so far as Article 8 was concerned under the legal position which existed prior to 9th July 2012.

5. The Judge found both the Appellant and his sister to be credible witnesses. They came from a polygamous family in Nigeria, having limited contact with their father and a mother who had come in and out of their lives. This had led to both the Appellant and his sister being looked after by their grandmother for a number of years before both the Appellant and his sister travelled to the UK in 2003, albeit at separate times. Ms Abu had supported the Appellant and his sister and that they had lived together in the UK since 2003. The type of upbringing that the Appellant and his sister had living apart from one parent and for a lengthy period of time both parents had brought the relationship between the Appellant and his sister closer than might otherwise have been the case particularly since 2003 when they moved to a new country. Neither the Appellant nor his sister had married and they continued to live together at the same address in South London. At paragraph 48 the Judge wrote:

> "I consider their relationship goes further than the normal emotional ties which might exist between adult siblings and amounts to an emotional dependency which in my view constitutes family life within the meaning of Article 8".

6. The Judge also accepted that during the twelve years the Appellant had been in the United Kingdom he had established a private life which would be interfered with by his removal from the United Kingdom. The Judge reminded himself that in assessing the proportionality of interference with protected rights he should have regard to the public interest considerations set out at Section 117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of effective immigration control was in the public interest and in this particular case the Appellant was unable to succeed under the Immigration Rules. The Appellant spoke English and had obtained A levels and a university degree. He was being supported by Ms Abu who provided him with accommodation. The private life established by the Appellant in the United Kingdom had been largely at a time when he had been an overstayer. However at paragraph 55 the Judge said,

> "I consider his relationship with his sister should be considered differently firstly because of the nature of the relationship but secondly because of his sister being in the UK was not a matter of her choice she having been brought to the UK when she was 9 years of age".

7. The Judge accepted that without family members to support the Appellant it would be potentially difficult for him to establish himself in Nigeria given the length of time he had been in the United Kingdom notwithstanding the qualification he had obtained whilst being in the UK. The Respondent had written to the Appellant's sister Ms Ogungbayi stating that she did not consider it would be reasonable for Ms Ogungbayi to leave the United Kingdom. The Judge found it would be a disproportionate interference with the Appellant's right to a family life under Article 8 if he were to be removed to Nigeria and he allowed the appeal.

The Onward Appeal

8. The Respondent appealed against that decision arguing that the case of **Gulshan [2013] UKUT 00640** and **Nagre [2013] EWHC 720** meant that an Article 8 assessment should only be carried outside the Immigration Rules where there were compelling circumstances not recognised by the Immigration Rules. The meaning of exceptional circumstances was one where refusal would lead to an unjustifiably harsh outcome. The relationship between adult siblings would not normally constitute family life unless there were special elements of dependency beyond normal emotional ties. In this case the Appellant was an adult and whilst he and his sister may have lived together there was no evidence of any dependency beyond normal emotional ties between the two. The evidence relied upon to demonstrate that they had resided together was approximately three years old so this did not confirm their residence together. Even if they were this did not demonstrate any dependency. If the Appellant's sister wished to she could relocate with the Appellant if not she could continue to remain in contact with him via modern means of communication.

9. The Judge had overlooked the decision in the case of **Nasim [2014] UKUT 00025** that Article 8 has limited utility and private life cases where such cases are "far removed from the protection of an individual's moral and physical integrity". The Tribunal in the instant case made no reference to the Appellant's moral and physical integrity and in any event little weight should be given to a private life established when a person's immigration status was unlawful or precarious.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Page on 29th January 2015. In granting permission to appeal he wrote:

> "The Judge's reasoning at paragraphs 51 to 58 of the decision is open to challenge because the Judge at paragraph 58 of the decision accepted that the Appellant was an overstayer but said that given that the Appellant had been in the United Kingdom for eleven years and had acquired a degree which allowed him to make a useful and productive contribution to society and had family members in the United Kingdom with whom he lived it would be disproportionate and in breach of Article 8 rights to family life under Article 8 if he were removed to Nigeria. At paragraph 56 the Judge said that the Appellant is now 30 years of age and had obtained a qualification in the UK so it could be argued that he could return to Nigeria, the country where he spent the majority of the first eighteen years of his life. Even though the Appellant's appeal fell to be determined so far as Article 8 was concerned under the legal position which existed prior to 9th July 2012 the Judge's decision does appear to be somewhat generous to the Appellant. The grounds of appeal are arguable so permission to appeal is granted".

Documentation Considered

11. On the file was the Respondent's bundle which comprised: immigration information on form PF1; Appellant's application for further leave to remain on form FLR(O) received 29th February 2012; Appellant's judicial review grounds running to six pages; decision of 27th March 2013; consent order whereby the Respondent agreed to withdraw the decision of 27th March 2013 and issue a fresh decision within three months dated 29th November 2013, this led to the decision of 17th March 2014; and explanation for refusal dated 17th March 2014. The Appellant's bundle submitted at first instance comprised the witness statement of the Appellant 17th October 2014; statement of the Appellant's sister, documents common to the Respondent's bundle; documents relating to the judicial review proceedings.

The Error of Law Stage

12. At the hearing before me I initially had to decide whether there was an error of law in the First-tier decision such that it fell to be set aside and the matter reheard. If there was not then the decision would stand. Whilst the permission to appeal had referred to the decision of the First-tier appearing "to be somewhat generous to the Appellant" of itself that would not constitute an arguable error of law. The

Respondent would have to show that there had been some material misdirection by the Judge in the determination.

13. One such misdirection did appear on the face of the determination namely the Judge's view that Article 8 was to be assessed without any reference to the post-July 2012 Rules. There had been two conflicting Court of Appeal decisions in **Edgehill** and **Haleemuddeen [2014] EWCA Civ 558** one of which had said that the post-July 2012 Rules could not apply where the application had been made before that date (**Edgehill**) and another case which had appeared to assume that the post-July 2012 Rules applied as soon as they came into force (**Haleemuddeen**). The matter was finally resolved by the case of **Singh [2015] EWCA Civ 74** which held but for a brief window between July and September 2012 decisions made after July 2012 were to be assessed under the post-July 2012 Immigration Rules.

14. That might not lead to a material error of law such that the decision should be set aside depending on how the Judge had carried out the proportionality exercise in this case. In oral submissions the Presenting Officer stated that following the case of **Singh** the Judge's decision that the appeal fell to be determined under the pre-July 2012 jurisprudence was clearly wrong. The Judge had failed to find compelling circumstances not recognised by the Rules. The Appellant's sister was now looking for a job and was taking first steps to look after herself. She was thus not dependent upon the Appellant. It was conceded by the Respondent that the Judge had not in fact allowed the appeal under Article 8 on private life grounds, he had allowed it on the family life relationship with the Appellant's sister.

15. In reply Counsel for the Appellant (who had represented the Appellant at first instance) relied on a passage from the case of **Re B [2013] 1WLR 1911 [2013] UKSC 33** a decision in care proceedings but important for this case because it reminded an Appellate Court in reviewing a Judge's first instance decision that the Appellate Court:

> "had to take into account both the advantages which the trial Judge had enjoyed in seeing the witnesses and the parties and also the fact that in focussing on future possibilities involved he had been making a valued judgment not exercising a discretion and that accordingly the Appellate Court should only intervene where it was satisfied that [the trial Judge's] decision was wrong and that having regard to the conclusions reached by the Judge he had been justified for the reasons he had given in determining that the threshold had been crossed".

If the Appellant could not meet the Rules then Article 8 had to be considered and there was family life between the Appellant and his sister. They had been brought up together, the sister was now an adult but if the relationship was severed there would be an impact upon her.

16. Having heard submissions and considered the papers in this case (there was no Rule 24 response to the grant of permission), I indicated that I found there was a material

error of law such that the decision of the First-tier should be set aside and the decision remade. I indicated that I would give fuller reasons in my determination which I now do. The Judge had approached the assessment of proportionality in this case on the mistaken basis that he should consider the law as it was before July 2012. Following **Singh** that was wrong and it led to the error that insufficient weight was placed by the Judge in the proportionality exercise on the fact that the Appellant could not succeed under the Rules.

17. Furthermore the relationship between the Appellant and his sister had been formed in this country at a time when the Appellant had no status to be here and thus little weight could be afforded it. The actual provision in Section 117B refers to a relationship with a qualifying partner. Neither the Rules nor the section makes specific provision for relationships between adults who are close family members as opposed to partners/spouses. Nevertheless such a gap means that it is even more important for an Appellant relying on a relationship with an adult sibling as in this case to demonstrate that there are compelling or compassionate circumstances such that the application should be allowed outside the Rules.

18. The Judge's finding was that there was an emotional dependency between the Appellant and his sister, placing weight on the fact that the Appellant's sister came to this country when she was 9 years of age and thus the fact that she had overstayed as a minor could not be something which could be held against her. That may well be so but the Judge had to assess the case under Article 8 as at the date of hearing before him, 23rd October 2014 by which time the Appellant's sister was 20 years of age. It was not clear from the determination what aspects of the relationship between the Appellant and his now adult sister had created a present emotional dependency over and above normal ties. That they had been brought up together would apply in a high proportion of cases of adult siblings and the Judge had failed to adequately demonstrate why in this particular case it led to an emotional dependency. I therefore set aside the decision at first instance and proceeded to rehear the appeal there being no reason why the matter should be remitted back to the First-tier to be heard again. I enquired what further evidence if any the Appellant wished to put forward (the Appellant's bundle filed for the first instance hearing before the First-tier Tribunal was on file). I was informed that the Appellant would give evidence but the Appellant's sister would not as she was not able to attend the court hearing due to work commitments. Neither would Ms Abu (who had not given evidence at first instance in any event).

The Appellant's Evidence

19. In oral testimony the Appellant stated that he had nothing to return to in Nigeria as there was nobody there and he could not find a job. The only living relative in Nigeria was his father with whom he had never lived under the same roof. The impact on the Appellant's sister of the Appellant's removal would be terrible. Although she was an adult he was still responsible for her. One difficulty she had was that she was not entitled to student loans and therefore "we come up with the fees". She had had to defer the second year of her Law degree, having completed the

first year, whilst the balance of the fees for her first year were paid and the fees in advance for the second year were found. Both the Appellant and his sister had lived with their aunt Ms Abu since being in the United Kingdom. The Appellant repeated that he had been unable to find a job despite his Chemical Engineering qualification because of his immigration status.

20. In cross-examination the Appellant was asked why his Chemical engineering qualification would be of no use to him in Nigeria. The Appellant replied that as far as he was aware there was a high level of unemployment in Nigeria. To find a job it was a question of who you knew and his chances would be virtually zero. He was not sure how specialised the job market would be. The Appellant was not sure which country his mother was in, last time he had heard from her he was 14 years of age. Today the Appellant said his sister was at work as she was trying to raise funds to get back to college. She had to get some cash together and on balance it was considered it was more important that she should be working that day. She worked for the store "Target". The money for the first part of his sister's fees had been obtained from family friends more by way of a loan. He doubted that these family friends could help him integrate back into life in Nigeria. They had given them money because they thought that the Appellant's application would be successful, he would be able to work and pay them back.

21. His own fees when he had studied for Chemical Engineering were about £1,000 per year. He had been able to afford that from doing odd jobs. The Appellant's sister proposed to continue her studies at University of Westminster. She had 30 months' discretionary leave (which I was informed would expire in September 2015). The Appellant said that they owed £5,000 as the balance for the first year's fees and a further £9,000 in advance for the second year's fees. He then added that she had not come to the Tribunal today because "I can't see her losing a week's pay". I queried this with the Appellant as his sister's attendance to give evidence would only have taken up one day. He repeated that on balance he did not consider it was important for her to be here today. In re-examination he said he had no contact with his aunt in Ogun State in Nigeria, he did intend to repay the loan for his sister's course fees.

Closing Submissions

22. In closing for the Respondent it was argued that in assessing proportionality of interference the Immigration Act and the Rules were relevant. The Appellant could not satisfy the Rules, he had not been in the United Kingdom for twenty years and therefore the application had to go outside the Immigration Rules. There was no family life in this case for the purposes of Article 8. There was no evidence showing that the relationship between the Appellant and his sister was over and above normal family ties. The Appellant's sister and the Appellant were taking their own steps in life. She was now 21 years of age and was studying law while working as a retail assistant for the shop Target. She was not present to support the Appellant's evidence. Indeed the contrary was the case, a conscious decision had been made that she should work rather than attend the Tribunal. The Appellant had said he was to a large extent dependent on Ms Abu. The financial provisions in Section 117B weighed

against the Appellant. He was 17 or 18 years old when he entered the United Kingdom but he had spent a large part of his life in Nigeria. His sister only had discretionary leave until September 2015. The Appellant had qualifications which he could use on return to Nigeria. For the Appellant to say he had no family ties in Nigeria was insufficient. His removal was proportionate to the public interest.

23. In closing for the Appellant it was argued that categories of family life were never closed and that there was family life in this case between the Appellant and his sister. Where family life did exist the United Kingdom was obliged to encourage it to flourish. The only way the Appellant could be removed would be pursuant to the aim of immigration control. If the Appellant was removed it would have harsh consequences for the Appellant and reliance was placed on the five step-by-step approach set out in **Razgar**. The Appellant came from a political family in Nigeria. He had no contact with his father or mother. There were insurmountable obstacles to renewing his life there. Following European Court of Human Rights decisions such a **Boultif** one had look at all the factors and weigh them. The Appellant did speak English, he was fully integrated into society and his appeal should be allowed.

Findings

24. The Appellant seeks to remain in this country outside the Immigration Rules under the provisions of Article 8. His appeal in relation to his private life was not allowed at first instance, the Judge stating that the Appellant might be able to establish a private life in Nigeria. The Judge allowed the appeal on the basis of the Appellant's right to a family life specifically his relationship with his sister.

25. As I have indicated neither the Rules nor the section make specific provision for a family life argument to be put forward where the parties are adult siblings as opposed to partners. Whilst I appreciate that the categories of family life are not closed in order to succeed outside the Rules the Appellant would have to demonstrate that there was something very compelling and/or compassionate about his relationship with his sister and the disruption that removal would cause.

26. In assessing the claim under Article 8 outside the Rules I bear in mind the step-by-step approach required by the case of **Razgar**. (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8? (3) If so, is such interference in accordance with the law? (4) If so, is such interference 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? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

27. That the Appellant has a family life with his sister is not in dispute. What is in dispute is the nature and extent of that family life. The evidence strongly suggests that the Appellant and his sister are leading their own independent lives. Whilst

they may be living at the same address, the Appellant's sister who is now 21 is working to support herself and has ambitions to continue her studies (assuming that she is granted an extension of leave when her current leave expires September this year). It is difficult to see in those circumstances how the Appellant and his sister can now be said to have an emotional dependency on each other which goes beyond normal emotional ties. I appreciate the point made by the Supreme Court in **Re B** that due weight should be given to the fact that the trial Judge has seen and heard the witnesses. However the Judge approached this case on a mistaken legal basis and therefore the decision at first instance was set aside. Since then I too have had the benefit of seeing the Appellant give evidence and am therefore in a position to assess the evidence myself. The Appellant's sister was not prepared to take one day off work to come to the Tribunal to support the Appellant in his evidence. In fact the case was listed at 2 o'clock indicating that she probably needed only to have taken off half a day. That there are debts to be repaid in connection with the studying that the Appellant's sister has undertaken so far is not necessarily of crucial importance in this case but it does show that the Appellant's sister is not financially dependent on the Appellant.

28. He is financially dependent on a third person Ms Abu who did not make herself known to the Tribunal at first instance and did not attend to give evidence before me. The family life between the Appellant and his sister would be interfered with by the removal of the Appellant to Nigeria. I do not need for the purposes of this case to go into the issue of whether it is reasonable to expect the Appellant's sister to return to Nigeria with him. She is an adult and can make her own decision. She can however continue her relationship with the Appellant through modern means of communication if she chooses to remain in the United Kingdom.

29. It is in the public interest that persons who seek to remain in the United Kingdom are financially independent because such persons are not a burden on tax payers and are better able to integrate into society (Section 117B(3)). The Appellant is not financially independent and it is not therefore in the public interest that he should remain in the United Kingdom. He has a qualification which he could put to use in Nigeria where UK qualifications are considered to have particular value. He has lived the majority of his life in Nigeria and appears to have a relative there who he admits to, his aunt. I do not consider that he has lost all cultural, family and social ties with his country of origin. I consider that there are no insurmountable obstacles to his relocation to Nigeria and re-establishing his life there. In this connection I note that the Judge at first instance considered that the Appellant might be able to establish a private life in Nigeria.

30. I do not consider that the consequences for the Appellant's sister of the Appellant's removal to Nigeria would be such as to lead this appeal to being allowed outside the Immigration Rules. I do not consider that the consequences of the disruption to their relationship would be unduly harsh. As I have indicated the Appellant's sister is already living her own life and would continue to do so. In assessing the proportionality of the interference with the Appellant's relationship with his sister, due weight should be afforded to the fact that the Appellant cannot bring himself

within the Immigration Rules, that he is not financially independent and that he can re-establish his life in Nigeria. On the other side of the equation, I do not consider that the effect on the Appellant's sister would be unduly harsh as she is capable of living her own life and is doing so. I consider therefore that such interference as there might be would be proportionate to the legitimate aim being pursued. The legitimate aim is immigration control, as the Appellant is here unlawfully as an overstayer. I therefore dismiss the Appellant's appeal against the decisions of the Respondent. I make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside.

I have remade the decision by dismissing the Appellant's appeal against the Respondent's decisions of March 2014.

Appellant's appeal dismissed.

Signed this 28th day of April 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

Although the file is not marked with evidence of payment of a fee (the appeal being against a decision to remove) the Judge at first instance made a fee award against the Respondent. To the extent that any fee was payable and that therefore a fee award could be made, I set that decision aside as well for the same reasons which I have set aside the decision allowing the Appellant's appeal.

Signed this 28th day of April 2015

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Deputy Upper Tribunal Judge Woodcraft