Upper Tribunal
(Immigration and Asylum Chamber) Appeal
Number: IA/32745/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 January 2015	**On 27 January 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MR FREDERICK OLUWADAMILOLA ADIGUN
(anonymity directions not made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Collins of Counsel
For the respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Nigeria, born on 1 March 1989 appealed against the decision of the respondent dated 18 July 2013 to refuse him leave to remain in United Kingdom outside the Immigration Rules and pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Nicholls dismissed his appeal in a determination dated 8 October 2014.

2. Permission to appeal was granted by First-tier Tribunal Judge VA Osborne on 27 November 2014 stating that it was arguable that the Judge made a material error of law in not considering the appellant's appeal pursuant to the case of **Razgar** and applied too high a threshold a test which was wrong. The appellant made clear that he did not make his application

pursuant to the Immigration Rules and clearly asked for his case to be determined outside the Immigration Rules. The Judge erred in law by considering the Immigration Rules and stating that there was nothing further for him to consider outside them and thereby fell into material error.

The First-Tier Tribunal Judges Findings

3. The Judge found that the appellant did not meet the requirements of the Immigration Rules in respect of his private and family life pursuant to 276 ADE and there are no factors which exist "either individually or cumulatively which could properly be described as exceptional, very compelling, highly unusual or any other such description". The Judge stated that the appellant's circumstances fall squarely within the current provisions in Appendix FM and there are no compassionate factors put forward by the appellant other than the obvious fact that his removal will disrupt the arrangements he has had in the United Kingdom.

4. The judge concluded "I do not consider that any of the factors listed by counsel are sufficiently unusual or exceptional to identify this as one of the few cases not adequately covered by the provisions of the Immigration Rules. He concluded that paragraph 276 ADE constitutes a complete code which deals with Article 8 issues in respect of this appellant and there are no factors which collectively outweigh the public interest in the proper enforcement of immigration control.

5. He went on to say, "I find that it is not required to separately consider the five questions posed in **Razgar** nor whether the decision to remove the appellant from the UK constitutes a reasonable and proportionate interference with his Article 8 rights beyond the balance already struck within the Immigration Rules. He dismissed the appellant's appeal.

Appellant's Grounds of Appeal

6. The appellants' grounds of appeal state the following. The First-tier Tribunal Judge has materially erred in law. At paragraph 15 and 16 of the determination Judge Nicholls set out the principles from two cases **MM and others [2014] EWCA Civ 985** and **MF Nigeria [2013] EWCA Civ 1192** and stated at paragraph 16 of his determination that recent clarifications given by the Court of Appeal including the High Court show that it can properly be said that the Immigration Rules constitute a complete code which deals with a person's Convention rights and it will take something exceptional or very compelling to outweigh the terms of the Immigration Rules. He posed the question that if the Immigration Rules do constitute such a complete code than the principles set out in **Razgar** and **Huang** must never be considered. Exceptionality is not a test which must be applied in individual circumstances.

7. At paragraph 17 the Judge stated that despite Counsel's best efforts, he is not satisfied that there exists in the appellant's case any factors which

either individually or cumulatively could properly be described as exceptional, very compelling, highly unusual or any other description". The Judge made a material error in law because not only did he considered a wrong test but failed to set out from which authority or authorities he derived the test from.

8. The test as described by Judge Nicholls as "exceptional, very compelling, highly unusual or any other such description" is not the test set out in the jurisprudence. For circumstances to be compelling, the facts of the case are required to be considered. Although the Judge considered the facts of the appellant's case in the determination, he considered the said facts with the wrong legal test in mind.

Submissions of the Parties at the Hearing

9. Mr Collins in his submissions stated the following. The Judge has applied too high a test for Article 8. The law as it stands states that the Judge should have considered the appellant's appeal pursuant to Article 8 as he did not make an application pursuant to the immigration rules but ***outside*** them.

10. Mr Tufan on behalf of the respondent submitted the following. There is no error of law in the determination of the Judge because he considered the evidence and did not find any exceptional circumstances in the appellant's case where he should be entitled to succeed under Article 8.

Findings on Error of Law

11. The Judge failed to recognise that the appellant had made his application pursuant to Article 8 of the European Convention on Human Rights and outside the Immigration Rules. The Judge stated that as the appellant does not fulfil the requirements of the Immigration Rules there "is nothing exceptional, very compelling, highly unusual or any other description in the circumstances" where he should consider the appellant's appeal pursuant to Article 8 when he cannot succeed pursuant to the Immigration Rules.

12. The Judge fell into error as he was only required to consider the appellant's appeal pursuant to Article 8 and not the Immigration Rules and repeated the respondent mistake which also incorrectly considered the appellant's appeal pursuant to the Immigration Rules when that was not the appellant's application.

13. The appellant however by not making an application in respect of his private and family life pursuant to the Immigration Rules inherently accepts that he cannot meet the requirements of the Immigration Rules. The Immigration Rules therefore must be the starting point in any Judge's assessment.

14. Therefore, it will only be in exceptional circumstances that the appellant will succeed pursuant to Article 8 when he cannot meet the requirements of the Immigration Rules. The Judge put it in this way and stated that

"there is nothing unusual or exceptional to identify this as one of the few cases not adequately covered by the provisions of the Immigration Rules". The Judge stated that the appellant's circumstances are adequately catered for within the Immigration Rules. The grounds of appeal did not state what circumstances that the Judge did not take into account and thereby fell into material error as opposed to error.

15. The Judge did take into account the appellant's circumstances and said that there is "nothing exceptional, very compelling, highly unusual or any other description in the circumstances". I have been asked to find that this amounts to too high a test and this is what brought the Judge into error. I find for the purposes of this appeal that the Judge fell into material error by not considering Article 8 specifically and I re-make the decision.

Remaking of the Decision

16. In determining whether the appellant's removal from the United Kingdom would constitute a disproportionate interference with his right to respect for private and family life under Article 8, I have considered each of the following issues, as laid down in **R v. Secretary of State for the Home Department, ex parte Razgar [2004] UKHL 27 at** paragraph 17 of the speech of Lord Bingham of Cornhill:

    (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 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?

17. The question that I have to decide is whether the refusal of leave to the appellant, 'in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8' (**Huang v Secretary of State for the Home Department [2007] UKHL 11 ('Huang', para. 20**). In considering this question, we have taken into account all factors that weigh in favour of the Appellant's deportation, including the desirability of applying a workable, predictable, consistent and fair system of immigration control (**Huang, para. 16**). Against this, I have taken into

account the effect that refusal of leave would have on the enjoyment of the appellant's private and family life in the appellant's case, bearing in mind the core value that Article 8 of the Human Rights Convention seeks to protect and the fact that '[t]heir family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially' (**Huang, para. 18**).

18. I have further considered the case recent decision of the House of Lords in **Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department [2008] UKHL 39** where the issue for determination was phrased in the following terms:

> 'In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the Appellant would interfere disproportionately with his Article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?

19. Baroness Hale observed that 'the right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed'. It was further said that: 'Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims'. In light of this decision we have to consider the family life of all those who share their family life with the appellant.

20. I have also had regard that from 28 July 2014 section 19 of the Immigration Act 2014 is brought into force: Article 3 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. Part 5A only applies where the Tribunal considers Article 8(2) ECHR directly.

21. It was accepted by Mr Tufan that the first four questions in **Razgar** must be answered in the affirmative. Therefore the only question that remains is whether the respondent's decision is proportionate to the respondent's legitimate interest in a fair and transparent immigration control.

22. I guide myself that I must make a fact sensitive assessment of the appellants' circumstances and make my own assessment of proportionality. It is obvious that respect for a claimant's family and

private life under Article 8 (1) is subject to proportionate and justified interferences in pursuit of a legitimate aim under Article 8(2). (**Izuazu**)

23. In considering proportionality specific to this appellant, I consider the submissions made on behalf of the appellant at the hearing and his witness statement as to what why his circumstances should be deemed exceptional such as he should succeed pursuant to Article 8.

24. The appellant claims that he has been in this country as a student. He claims that he has now completed his education and after resetting his last exam the results are expected in February 2015. He said that he has a training contract which is required before he can practice as an accountant. It was accepted that the appellant can do his training contract outside the United Kingdom.

25. It has been decided by the higher Courts that the fact that someone has studied in this country is not sufficient basis upon which to base an Article 8 claim. The appellant has been in this country as a student for a very long time. He will receive his results in February 2015 and will be a qualified accountant subject to him completing his training contract which can be done anywhere including Nigeria.

26. I find that the appellant must have always known that he would have to return to his country after the finish of his education unless he fulfils the requirements of the Immigration Rules for further leave to remain which he has not.

27. The appellant claims that the other exceptional circumstances this case is that he has a girlfriend in this country who is a Kenyan but has British nationality. I consider the appellant's girlfriend as the appellant's private life under Article 8. The appellant can continue his relationship with his girlfriend from abroad or if she wishes she can join him in Nigeria.

28. I find there are no compelling circumstances in the appellant's case for him to succeed pursuant to Article 8 when he cannot succeed pursuant to the Immigration Rules for leave to remain in this country.

29. Considering all the evidence in the round I find that even if there is some disturbance in the appellant's private life that he has formed in this country with his studies and his girlfriend, it is not sufficient to trump the interests of the respondent.

Decision

Appeal dismissed

Signed by,

Dated this 25th day of January 2015

A Deputy Judge of the Upper Tribunal

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Mrs S Chana