**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: IA/50493/2013**

**THE IMMIGRATION ACTS**

**Heard at** Field House
**On** 28July 2015

**Decision and Reasons Promulgated**
**On 11 August 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**ADEREMI ONADIPE ODUKOYA**
**(Anonymity Direction Not Made)**

Respondent

**Representation:**
For the Appellant: Mr N Idris (counsel), instructed by Rees Myers, solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

**DECISION AND REASONS**

Introduction

1 I have considered whether any party requires the protection of an anonymity direction. No anonymity direction was made previously in respect of the appellant. Having considered all of the circumstances and the evidence, I do not consider it necessary to make an anonymity order.

2 For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Odukoya as the appellant, reflecting their positions before the First Tier Tribunal.

3 This is an appeal by the Secretary of State against a decision of First Tier Tribunal Judge Boardman promulgated on 10 March 2015 which allowed the appellant's appeal against the Secretary of State's decision to refuse to grant leave to remain in the UK.

**Background**

4 The appellant was born on 17 January 1974. He is a citizen of Nigeria.

5 (a) The appellant entered the UK as a student on 8 September 2007. His leave to remain in the UK was extended by the respondent until 31 December 2011. The appellant's wife and son (born 6 May 2002) entered the UK on 21 March 2009 with leave to do so as dependents of the appellant until 31 December 2011. On 5 January 2011, the appellant and his wife had a daughter born in the UK.

(b) On 31 March 2010, the appellant applied for indefinite leave to remain as the relative of a person settled in the UK. His application was refused. On 13 March 2013, the appellant applied for leave to remain in the UK on the basis of established family and private life. That application was refused on 8 May 2013. The appellant did not have a right of appeal against that decision because his leave to remain in the UK had expired before his application was submitted.

6 The appellant asked the respondent to reconsider the decision of 8 May 2013 and, on 19 November 2013, the respondent adhered to the decision of 8 May 2013 and served a decision to remove the appellant on 21 November 2013. It is against that decision that the appellant appealed.

**The Judge's Decision**

7 The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge Boardman ("the judge") allowed the appellant's appeal in a determination promulgated on 10 March 2015. The judge found that the appellant fulfilled the requirements of Paragraph 276ADE(1)(vi), deciding that there would be very significant obstacles to the appellant's reintegration into his country of origin. The judge went on to consider Article 8 outside of the Rules and found that the respondent's decision was a disproportionate breach to the right to respect for both family and private life.

8 Grounds of appeal were lodged and on 1 May 2015, First Tier Tribunal Judge Andrew gave permission to appeal, stating *inter alia*:

> "2 I am satisfied that there is an arguable error of law for the judge to rely on a medical report from 2012 in order to make findings at a hearing in 2015 which findings then led onto the judge finding that the appellant could not return to his country of origin in part because his medical condition prevented him from working and thus there are very significant obstacles to the appellant's return.
>
> 3 I am also satisfied that there is an arguable error of law in that the judge did not take note of the case law in relation to Article 8 and

in particular to Zoumbas v SSHD [2013] UKSC 74 and EV (Philippines) v SSHD [2014] EWCA Civ 874."

## The Hearing

9 Mr Kandola argued that the judge erred in allowing the appeal under both Paragraph 276ADE of the Immigration Rules and in relation to Article 8 ECHR consideration outwith the Immigration Rules. He accepted that the correct test was applied in relation to Paragraph 276ADE ("*very significant obstacles...")* but argues that the factors taken into consideration by the judge fell outwith the consideration of the provision of Paragraph 276ADE(1)(vi) and that the judge's reasoning demonstrated that, as a matter of fact, he did not apply the correct test. In addition, he argued that the evidence produced (focusing particularly on a medical report dated 30 November 2012) did not support the judge's findings. In relation to consideration of Article 8 outwith the Rules, Mr Kandola submitted neither Section 117B of the 2014 Act nor the established case law have been properly considered and that the judge's exercise in assessing proportionality was fundamentally flawed.

10 Mr Idris for the appellant urged me to restrict consideration to the matters specifically mentioned by First Tier Tribunal Judge Andrew when granting permission to appeal (set out about at [8] above). He submitted that there are no material errors of law contained within the judge's decision and that the correct legal tests have been applied and that the findings made by the judge were findings which were open to him on the evidence produced. He urged me to dismiss the appeal and to affirm the decision of the judge promulgated on 10 March 2015.

## Analysis

11 The appellant's application was submitted on 13 March 2013. On 19 November 2013, the respondent made the decision against which the appellant appeal, adhering to the decision originally made on 8 May 2013. All of those dates fall within the period between 9 July 2012 and 28 July 2014.

12 Between 9 July 2012 and 28 July 2014, the wording of Paragraph 276ADE(6) was "...*is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK*".

That is clearly the test which was applied by the respondent in the reasons for refusal letter of 19 November 2013.

13 At [30], the judge applies the wrong test. The judge narrates there *"...the requirements of Paragraph 276ADE require the appellant to show that there are not just "obstacles", and not just "significant obstacles", but "very significant obstacles" to the appellant's integration into Nigeria".*

14 I therefore find that the decision is tainted by a material error of law because the wrong wording for Paragraph 276ADE(6) was applied.

15 The judge went on to consider Article 8 outside the Rules and found that the respondent's decision was a disproportionate breach of the right to respect for family life because of the relationship of dependency between the appellant and his mother who is in the UK. He finds that private life is established and at [60], he sets out his exercise of assessing the proportionality of the decision, but in assessing "*public interest*" at [56] and [57], the judge clearly takes account of a finding that the appellant satisfies the requirements of Paragraph 276ADE. As I have already found that the wrong Rule was applied, the assessment of proportionality in terms of Article 8 outwith the Rules cannot be correct. I therefore find that I must set aside the decision because it is tainted by material errors of law.

**Analysis**

16 It is beyond dispute that the appellant cannot fulfil the requirements of Appendix FM of the Immigration Rules. It is equally not disputed that the appellant does not fulfil the requirements of Paragraph 276ADE(1)(i) to (v).

17 The application was accompanied by a "*statement of facts*" which says that the application proceeds under the sub-paragraph 276ADE(1)(vi) of the Immigration Rules "…*on the grounds that the first claimant needs to remain with his settled mother who suffers from Parkinson's disease and on the grounds of the first claimant's own medical condition".* Those grounds do not engage the relevant wording of Paragraph 276ADE(1)(vi) which existed between the date of application and the date of decision.

18 In the statement of grounds of appeal, the appellant's position changes and at paragraph 3, it is argued "*His mother is in the UK and his father is deceased. He is the only child of the family. The claimant has no ties (social, cultural or family) with Nigeria…"* The evidence produced by the appellant is summarised in his witness statement of 4 August 2014. That witness statement dwells on the appellant's mother's medical conditions and the appellant's own medical conditions, and is silent on the appellant's claim to have no ties whatsoever (including social and cultural) to his country of origin.

19 The appellant arrived in the UK when he was 33 years of age. He has now been in the UK for just under 8 years. The appellant argues that he has no relatives in Nigeria, no home in Nigeria, no job there and no prospect of a job but I cannot close my eyes to the fact that the appellant spent his formative years in Nigeria, was educated in Nigeria and only came to the UK to further his education. By the time the appellant made his application, he had spent 21% of his life in the UK. At today's date, he has spent 24% of his life in the UK. That means that 76% of his life was spent in Nigeria. The appellant is a Nigerian national. His wife and children are Nigerian nationals. The weight of evidence indicates that the appellant has not lost all ties to his country of origin. The appellant cannot fulfil the requirements of Paragraph 276ADE of the Immigration Rules.

20 In **Meera Muhiadeen Haleemudeen [2014] EWCA Civ 558** Lord Justice Beatson confirmed it is necessary to find "*compelling circumstances*" for going

outside the Rules. He confirmed that "*the passages from the judgments in the cases of* ***Nagre*** *and* ***MF (Nigeria)*** *appear to give the Rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights*". He did not consider that it is necessary to use the terms "exceptional" or "compelling" to describe the circumstances, and it will suffice if that can be said to be the substance of the tribunal's decision.

21. In **MM (Lebanon) and others [2014] EWCA Civ 985** it was suggested that where a particular set of the immigration rules are not a complete code, then the issue of proportionality under Article 8 will be more at large. In this respect in **R (on the application of Ganesabalan) [2014] EWHC 2712 (Admin)** it was held that unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned because Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision.

22. If I find such compelling circumstances, I then have to determine the following separate questions:

    (i) Does family life, private life, home or correspondence exist within the meaning of Article 8

    (ii) If so, has the right to respect for this been interfered with

    (iii) If so, was the interference in accordance with the law

    (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

    (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

23 Section 117 of the Nationality, Immigration and Asylum Act 2002 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within **Razgar**.

24. The effect of the Respondent's decision does not cause separation for this family. The family will remain together. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of **ZH (Tanzania) v SSHD [2011] UKSC 4**.

25. I remind myself of the cases of **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197**. It is the intention of the SoS to ensure that the Appellant, his wife and their two children

stay together. It has long been established that it is in the interests of children to remain with their parents. The Respondent's decision maintains the unity of this family and does not separate the children from the parents. The interests of the children are served because the integrity of the family unit is not challenged.

26 In **MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279** the Court of Appeal noted that the courts had declined to say that Article 8 could never by engaged by the health consequences of removal but they had never found such a breach and had not been able to postulate circumstances in which such a breach was likely to be established. The only cases where the absence of adequate medical treatment in the country to which a person is to be deported would be relevant to Article 8 are those where it is an additional factor to be weighed in the balance with other factors that engaged Article 8 (paras 17 – 23). This approach was endorsed by Laws LJ in **GS (India) and Others [2015] EWCA Civ 40** (para 86).

27. The appellant's health conditions are set out in a medical report dated 30 November 2012. That "*report*" is in fact just a letter from the appellant's GP which sets out, in the briefest of terms, six medical conditions from which the appellant suffers. It does no more than provide a summary of diagnosis. It provides no opinion on the effect of those conditions on the appellant. The final sentence of the letter was misconstrued by the judge. The decision records that the appellant is not able to work and will not be able to work in Nigeria. That is not what the letter from the appellant's GP dated 30 November 2012. It says "*Mr Odukoya has been under considerable stress as he is unable to work and make ends meet for his family at present*".

28 There is no support for the appellant's assertion that he is so ill that he cannot work, either in the UK or in Nigeria.

29 The appellant argues that family life exists because of a relationship of dependency with his mother. The appellant's mother's medical conditions are set out between documents 34 and 58 of the appellant's bundle. The appellant's mother suffers *inter alia* from Parkinson's disease and has a diagnosis of cancer, but it is clear from the evidence produced that the appellant's mother is receiving treatment from the NHS. It is also clear from the evidence produced that the appellant's mother maintains her own home, she does not live with the appellant. There is insufficient evidence to indicate that the appellant's mother cannot pursue the ordinary activities of daily living with the assistance of the appellant.

30 In **Kugathas v SSHD [2003] INLR 170** the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In **Etti-Adegbola v SSHD [2009] EWCA Civ 1319** the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was "*no way exceptional or beyond the norm*". In **JB (India) and Others v**

**ECO, Bombay [2009] EWCA Civ 234** the Court of Appeal reiterated that the approach in **Kugathas** must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children.

31. The evidence in this case indicates that Family life (within the meaning of Article 8 ECHR) does not exist between the appellant and his mother.

32 The effect of the respondent's decision would not force separation on the appellant's family. There is no breach to the right to respect for family life.

33 It is argued that private life is established because the appellant's children have been in the UK for 6 years. Neither of the appellant's children are "*qualifying children*" in terms of Section 117B(6) of the 2014 Act. Both of the children benefit from education in the UK. They have made friends in the UK. They enjoy sporting and social activities in the UK.

34 Because of the operation of Section 117B(1) of the 2002 Act, I must find that removal is in the public interest. I consider the proportionality factor set out in Section 117B. It is in the appellant's favour that he speaks English but the remaining factors count against the appellant. The appellant is not financially independent. The appellant's claim is that he cannot work (even though I find that he could). The appellant last had leave to remain on 30 December 2011. He has remained in the UK for more than three and a half years illegally. That period amounts for more than half of the lifetimes of both of his children. I must give little weight to any private life that has been established throughout the period that the appellant has overstayed his right to remain in the UK.

35 There are therefore more factors weighing against the appellant than weighing in his favour. If I were enabled to consider this case outwith the Immigration Rules, I would have to find that the respondent's decision is a proportionate breach to any right to respect for any Article 8 rights that the appellant would have. However, I find that there are no circumstances which would merit consideration of the appellant's case outwith the Immigration Rules.

**Decision**

36 The decision promulgated on 10 March 2015 contains material errors of law.

37 I therefore set the decision promulgated on 10 March 2015 aside.

38 I remake the decision and substitute the following decision.

39 The appeal is dismissed under the Immigration Rules.

40 The appeal is dismissed under Article 8 ECHR.

Signed:

DEPUTY UPPER TRIBUNAL JUDGE DOYLE
3rd August 2015