Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/31432/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision and Reasons Promulgated**
On 4 January 2016	**On 4 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KEHINDE AKINWUNMU ABOOLUWA FAKOLUJO

Respondent

Representation:

For the Appellant: Mr S Staunton, Senior Home Office Presenting Officer
For the Respondent: Mr S Westmaas, Counsel, instructed by Greenland Lawyers LLP

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Majid) allowing the respondent's appeal against a decision taken on 23 July 2014 refusing the respondent further leave to remain and to remove the respondent from the UK.

Introduction

3. The respondent is a citizen of Nigeria born in 1985. The respondent applied for a six month visit visa on 28 January 2002 and that was subsequently issued, valid from 17 June 2002 to 17 December 2002. The respondent arrived in the UK and subsequently applied for registration as a minor for British citizenship on 15 March 2006 but that application was refused on 14 June 2006. On 6 October 2010 the respondent lodged a human rights application under Article 8 but that was refused on 24 March 2011 with no right of appeal. The respondent made further representations on 18 May 2011 and 10 June 2014. The respondent claimed to have family and private life in the UK with his twin brother, sister and their children.

4. The Secretary of State accepted the respondent's identity and nationality but concluded that he did not meet the requirements of the Immigration Rules and there were no exceptional circumstances such as to justify a grant of leave outside the Rules. There might be some degree of bond with his siblings but that did not go beyond ordinary emotional ties. Length of residence and good character were not sufficient to allow him to remain in the UK. The respondent had no leave to remain in the UK since 2002.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Taylor House on 8 July 2015. He was represented by Mr Westmaas. The First-tier Tribunal found that the respondent had been caught by the change in nationality rules after being born in South London and without any parent or relative left in Nigeria. He had every reason to think that he would have the benefit of compassionate exercise of discretion but he was instead subject to the strict nationality rules. He had nobody in Nigeria except an aunt who had recently gone there. He was a great support to the children of his sister and brother and they would be lost if he were to be removed. Best interests of the children applied. The respondent should have the exercise of compassionate discretion in his favour remembering that all of his life was in the UK and he had no one in Nigeria to give him support.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by failing to give adequate reasons for allowing the appeal outside the Rules and by failing to consider section 117B of the 2002 Act or taking into account the policy as reflected in the Rules.

7. Permission to appeal was granted by First-tier Tribunal Judge Colyer on 29 October 2015 on the basis of both grounds advanced by the Secretary of State.

8. Thus, the appeal came before me

Discussion

9. Mr Staunton submitted that there were no reasoned compassionate circumstances and no reason why the rule of law should favour the respondent. There was no reference to the 2002 Act and no balancing exercise. The appeal should be remitted for a de novo hearing.

10. Mr Westmaas conceded that he would be wasting my time by seeking to maintain that there was not a clear error of law in relation to failure to consider the 2002 Act. The appeal should go back to the First-tier but there was no need for a de novo hearing. The appeal could be remitted for a more detailed hearing. Paragraph 23 of the decision is a reasonable assessment of the evidence. The findings of fact at paragraph 10 should be preserved. Following MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC), the decision letter was clearly flawed and there was no cross-examination of the respondent. The judge considered this to be a clear cut case and that is not surprising. The appeal should be remitted back to the same judge.

11. Mr Staunton submitted that it was not appropriate to go back to the same judge. There were enough issues in the decision for it to go back to a different judge.

12. I find that the decision is incomplete. The judge did not explicitly find that there were identified compelling circumstances to support a claim for grant of leave to remain outside the Rules, as required by paragraph 33 of SSHD v SS (Congo) [2015] EWCA Civ 387. Nor did the judge consider the factors identified in section 117B of the Nationality, Immigration and Asylum Act 2002 as required by Forman (ss 117A-C considerations) [2015] UKUT 412 (IAC). Nor was there a clear proportionality assessment, taking the section 117B factors into account. The errors of law are material and a further hearing is required.

13. However, I find force in the submissions made by Mr Westmaas. The judge clearly regarded this as a clear cut case where leave should be granted outside the Rules and the respondent should not be deprived of the favourable findings of fact made by the judge. I find that the appeal should be remitted to the same judge to consider the outstanding issues and to make findings.

14. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under Article 8 involved the making of errors of law and its decision cannot stand.

Decision

15. Both representatives invited me to order a rehearing in the First-tier Tribunal if I set aside the judge's decision. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I consider that an appropriate course of action. I find that the previous findings of fact set out at paragraph 10 of the decision should be preserved.

16. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined again by First-Tier Tribunal Judge Majid.

Signed

Deputy Upper Tribunal Judge Archer Date 1 February 2016