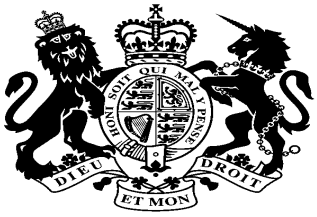

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number IA/03759/2014**
IA/03763/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21st August 2014
Prepared 22nd August 2014

Determination Promulgated
On 28th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

KOFOWORADE OLUWADARA WILLIAMSON

First Appellant

And

OYEWOLE OLUGBENGA SUPO-ORIJA

Second Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representatives:

For the Appellant: Mr C Emezie (Solicitor, Dylan Conrad, Kreolle)
For the Respondent: Mr L Tarlow (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants are a mother and son and nationals of Nigeria. They entered the UK on the 17th of October 2004 on visit visas, the Second Appellant did not leave but the First Appellant left and returned in 2005 but does not appear to have left since then. There have been previous proceedings but the instant applications were made on the 26th of June 2013 on form FLR(O). They were refused on the 20th of December 2013.

2. The Appellants appealed to the First-tier Tribunal. Their appeals were heard by First-tier Tribunal Judge Oakley at Hatton Cross on the 28th of May 2014. In his determination of the 28th

of May 2014 he dismissed the appeals under the Immigration Rules but allowed the appeals under article 8 of the ECHR.

3. The Secretary of State sought permission to appeal in an application of the 20th of June 2014. It was submitted that having dismissed the applications under the Immigration Rules the Judge then erred in the approach taken to article 8 and Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 60 and that the Judge had applied a near-miss test contrary to Miah [2012] EWCA Civ 261. Permission was granted by First-tier Tribunal Judge Pirotta on the 3rd of July 2014.

4. The finding made in respect of the Immigration Rules is set out in paragraph 20 in which the Judge stated of the Second Appellant "With regard to 275ADE(v), whilst he is over the age of 18 and under the age of 25, he had not, at the time of the application, which was made on the 9 September 2013, spent half his life continually in the United Kingdom." Reasons were given in the following paragraphs.

5. The appeal was allowed under article 8. At paragraph 27 the Judge found that the Appellant and his mother did not have a family life that engaged , which was made on the 9 September 2013, spent half his life continually in the United Kingdom." Reasons were given in the following paragraphs.

6. The appeal was allowed under article 8. At paragraph 27 the Judge found that the Appellant and his mother did not have a family life that engaged Kugathas as "there is no family life between them, other than the normal emotional ties of a mother and son…" In paragraph 28 it was found that article 8 was engaged, presumably on the basis of private life.

7. In paragraph 30 the Judge stated "I will first of all deal with the Second Appellant who only just failed to establish that he could satisfy Rule 276ADE(v) and if indeed I had been entitled to consider the matter as at the date of the appeal he would have satisfied this part of the rule. That near miss is significant so far as the Second Appellant is concerned. I also accept that the Second Appellant has spent at least half his formative years in the United Kingdom and no longer has any siblings living in Nigeria and has never had any benefit of working in Nigeria and would have been quite young when he spent the first 10 years of his life living there with his mother." Paragraph 31 states "Taking all those factors into account, I conclude that it would be a disproportionate decision to remove the Second Appellant."

8. The First Appellant's position was considered in paragraphs 32 and 33. It was noted that she had only spent 10 years in the UK living in a Nigerian household and attending a church with a Nigerian pastor. There was no evidence of family connections in Nigeria. In paragraph 33 the Judge found that as the First Appellant had been living with the First Appellant in a family unit and his removal would be disproportionate the effect on the Second Appellant would make her removal disproportionate.

9. The position of the Secretary of State is set out in the application for permission to appeal submitting that the Judge had not properly assessed the compelling factors in the case. It had not been established that there were arguably good grounds to consider the Appellants circumstances outside the rules. In addition the Judge had applied a near-miss approach contrary to the decision in Miah [2012] EWCA Civ 261.

10. At the hearing before the Upper Tribunal the grounds were briefly amplified and the chronology of events clarified. I was told that the Second Appellant was born on the 8th of January 1994,

that the Appellants had entered the UK on the 17th of October 2004 (on visit visas) and that the application under appeal was made on the 26th of June 2013.

11. It follows that the Second Appellant was aged just over 10¾ (10 years, 9 months and 9 days to be exact) when he entered the UK on the 17th of October 2004. I was told that he has not left the UK since and proceed on that basis. The application was made on the 26th of June 2013 which is 8 years, 8 months and 9 days later. At the date of the application the Appellant was aged just over 18½, at the date of the hearing he was aged just under 19½. By the date of the hearing on the 28th of May 2014 he had been in the UK for 9 years, 7 months and 12 days. On the 28th of May 2014 he was aged 20 years, 4 months and 20 days. By my calculations he had not spent half his life in the UK by the time of the hearing.

12. For the Appellant it was submitted that the grounds were misconceived. Although the Appellant had not cross appealed or submitted a rule 24 reply (funding issues being the explanation) it was submitted that the Judge was wrong to have found that the Second Appellant did not meet the Immigration Rules as section 85(4) of the 2002 Act and the cases of YZ and LX (effect of section 5(4) – 2002 Act China [2005] UKAIT 00157 and DR (Morocco) indicated and if the Appellant satisfied the rules at the date of the hearing the Judge would have to take that into account.

13. Mr Emezie also submitted that the Judge had not relied on a near-miss in finding for the Second Appellant. The Judge had followed Gulshan and it was suggested that the findings could only be attacked if they were irrational which was not raised in the Secretary of State's application. The findings in paragraph 32 followed the oral evidence and were sufficient to be insurmountable obstacles or unreasonable.

14. Paragraph 276ADE states "(1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:…
(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment)."

15. Section 85(iv) of the 2002 Act provides: "On an appeal under section 82(1), 83(2) or 83A(2) against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision."

16. The case of YZ and LX concerned an appeal relating to paragraph 317 of the Immigration Rules. That paragraph set out the requirements to be met for dependent relatives to be admitted to the UK but made no reference to the date on which matters were to be assessed. It was an in-country and so in the absence of any contrary provision was to be assessed at the date of the hearing, that was the result of the decision of the Tribunal. DR (Morrocco) relates to the effect of section 84(5) to out of country decisions where the date of the decision is the date at which matters have to be assessed.

17. The wording of paragraph 276ADE(iv) requires that an appellant's circumstances be assessed "at the date of application". That wording is clear and unambiguous. Section 85 has no bearing on the date at which the Appellant's circumstances are to be assessed, that is determined by the wording of the rule under consideration and whether the appeal is in or out-of-country. In this appeal to meet the requirements of paragraph 276ADE the Second Appellant had to show that at the date of the application he was between 18 and 25 and had been in the UK for at least half his life, the Judge was right to find that he did not and to dismiss his appeal under the rules. There is no suggestion that the First Appellant met the requirements of the Immigration Rules.

18. The approach taken by the Judge to article 8 is however open to criticism on a number of grounds. The first is that he could only consider article 8 if the Appellants' circumstances were sufficiently compelling and not sufficiently recognised by the rules. This is underlined by the case of Shahzad (Article 8: legitimate aim) Pakistan [2014] UKUT 85 (IAC) which supports the approach taken in Gulshan.

19. The fact is that the Appellants' circumstances were recognised under the Immigration Rules, the Appellants did not meet the requirements of the rules. Failure to meet the requirements of the rules is different from a lacuna in the rules, here the rules allow for lengthy presence in the UK from an early age and so I find that the Appellants' situation was met by the rules. There was nothing unusual about the circumstances of the Appellants that could be said to be compelling either, there are no health issues or other facts out of the ordinary that would require further consideration of the appeals.

20. There is also an issue with respect to the Judge's approach to family life. There is an irreconcilable contradiction between the finding in paragraph 27 that there is no family life between the Appellants beyond the normal emotional ties, following Kugathas, and the finding in paragraph 33 that the effect of the removal of the Second Appellant would make removal of the First Appellant disproportionate. In the light of the finding in paragraph 27 his position has no bearing on the First Appellant's position.

21. Finally in paragraph 30 of the determination there is an error in relation to the Second Appellant's position in respect of his failure to meet the requirements of the rules. The phrase "that near miss is significant" is clearly an error as that approach has been deprecated in Miah for clear reasons.

22. For reasons given above the Judge applying Gulshan could not properly have proceeded to consider article 8 but even if that was permissible the reasons given for allowing the appeal were not permitted by the case and on that basis the decision cannot stand.

23. Having considered the submissions that were made I am satisfied that the circumstances of the Appellants' appeals were such that they were properly refused under the Immigration Rules and that there was no basis for considering their position outside the rules. The evidence discloses no circumstances that are not considered within the rules and

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of the Appellants.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 28th August 2014