



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/39143/2013

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 27 January 2015

On 3 February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE APLEYARD

Between

**MRS HELEN OMOTAYO LASHORE
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. C. Bexson, Counsel.

For the Respondent: Mr. N. Bramble, Home Office Presenting Officer.

DECISION AND DIRECTIONS

1. The appellant is a citizen of Nigeria born on 7 March 1945. On 24 November 2012 she applied for indefinite leave to remain outside the Immigration Rules on the basis that she is a parent, grandparent or other dependent relative of a person present and settled in the United Kingdom. The respondent refused her application in a refusal letter dated 3 September 2013 on the grounds that the appellant did not meet the requirements of the Immigration Rules HC 395 (as amended) as there

were no provisions for dependant applications. The application was therefore refused on grounds that variation of leave to remain had been sought for reasons not covered by the Immigration Rules. The appellant's application was considered and refused in accordance with paragraph D-LTRPT.1.3 with reference to R-LTRPT.1.1 of the Immigration Rules. The respondent considered the application in accordance with paragraph 277C of Appendix FM and noted that the appellant had entered the United Kingdom on 3 July 2011 and that she had returned to Nigeria on three occasions since that date. She last entered the United Kingdom on 25 April 2012. The respondent found the appellant had not met the requirements of paragraph 276ADE. Notwithstanding this the appellant's application was considered on compassionate and compelling factors. The appellant's application was refused under paragraph 322(7).

2. The appellant appealed against that decision and her appeal was heard by Judge of the First-tier Tribunal Samimi, who in a decision promulgated on 3 October 2014 dismissed the appellant's appeal.
3. On 17 November 2014 Judge of the First-tier Tribunal Kelly gave permission to appeal. In so doing his reasons were:-

"1. The appellant seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Samini, promulgated on the 3rd October 2014, to dismiss her appeal against the respondent's refusal of her application (made outside the Immigration Rules) for leave to remain as the parent of her British sons.

2. The Tribunal considered whether there were exceptional circumstances, insufficiently recognised by the Immigration Rules, which would render the appellant's removal unjustifiably harsh. It concluded that there were no such circumstances in the appellant's case, and it therefore dismissed the appeal. That approach was in line with **Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 00640 (IAC)**. It is however arguable, as the application contends, that the Tribunal ought to have undertaken a full assessment under Article 8. Although not cited in the application, the appellant's contention is arguable supported by the *dicta* of Atkins LJ in **MM & Ors, R (On the Application Of) v Secretary of State for the Home Department [2014] EWCA Civ 985** (with particular reference to paragraph 135). It is also arguable, that had the Tribunal undertaken a full assessment under Article 8, it may have reached a different conclusion."

4. Thus the appeal came before me today.
5. Ms Bexson relied on the grounds supporting the application for permission to appeal to the Upper Tribunal. She contended that the judge had failed to make a proper assessment of the appellant's Article 8 claim and had wrongly relied on "exceptional circumstances". In so doing the judge had

not considered the totality of the evidence and had failed to give sufficient reasons for her findings on exceptional circumstances and whether it would be disproportionately harsh or a fair balance between the interests of the community and the appellant's family to expect the appellant to return to Nigeria and apply for entry clearance taking into account her fragile medical condition.

6. Mr Bramble, in opposing the application, argued that the First-tier Tribunal Judge directed herself appropriately and that it was open for her to follow the Tribunal authority of **Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC)**. Further that albeit the judge had not, on the face of the decision, carried out a balancing exercise in accordance with **Huang [2007] UKHL 11** and **Razgar, R (on the Application of) v Secretary of State for the Home Department [2004] UKHL 27** the judge had nonetheless dealt with all the issues thoroughly taking into account the evidence and making appropriate findings.
7. Case law in relation to Article 8 has developed since **Gulshan**. In **R (on the application of Esther Ebum Oludoyi and Others) v SSHD (Article 8 - MM (Lebanon) and Nagre) IJR [2014] UKUT 539 (IAC)** it was held that there was nothing in **R (Nagre) v SSHD [2013] EWHC 720 (Admin)**, **Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC)** or **Shahzad (Article 8: legitimate aim) [2014] UKUT 85 (IAC)** that suggested that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules and which would lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This was consistent with paragraph 128 of **MM and Others, R (on the application of) v SSHD [2014] EWCA Civ 985** that there was no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in **Ganesabalan, R (on the application of) v SSHD [2014] EWHC 2712 (Admin)**, there was no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which were called for were informed by threshold considerations. In **Aliyu and Another v R (on the application of) v SSHD [2014] EWHC 3919 (Admin)** the claimants, Nigerian nationals, sought judicial review of the Secretary of State's decisions refusing them leave to remain. The Administrative Court, in allowing the application, held that the Secretary of State had been required to give separate consideration to Article 8 of the ECHR in her decisions and that there had been no adequate assessments made outside the Immigration Rules resulting in unlawful decisions. The errors were not material, as it could not be concluded with any degree of confidence that the claimants' claims would necessarily fail.

Notice of Decision

8. In light of these authorities and for all the reasons put forward in the grounds seeking permission to appeal I find that the making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, by consent, to be dealt with afresh in relation to the Article 8 claim only. Both parties accepted that this was an appellant who could not meet the requirements of the Immigration Rules. This remittal is pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Samimi.
9. No anonymity order has been made hitherto in these proceedings and no reason was put before me why such an order should now be made.

Signed

Date 2 February 2015.

Deputy Upper Tribunal Judge Appleyard

DIRECTIONS

1. This appeal will be heard at the Hatton Cross hearing centre on a date to be fixed.
2. The time estimate is two hours.
3. Any additional evidence from either party to be filed and served no later than five working days prior to the substantive hearing.

Signed

Date 2 February 2015.

Deputy Upper Tribunal Judge Appleyard