Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37748/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 October 2015	**On 12 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLAKUNBI AKINDURO
(ANONMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Miss P Solanki, of Counsel, instructed by Wilsons Solicitors

DECISION AND REASONS

Anonymity

1. No anonymity direction was made by the First-tier Tribunal. I have considered whether any parties require the protection of an anonymity direction. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Background

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2. This is an appeal by the Secretary of State for the Home Department (hereafter "the Secretary of State") against the decision of First-tier Tribunal Judge J Macdonald. On 14 May 2015 the Judge allowed the appeal of Mrs Akinduro (hereafter "the claimant") against a decision of 20 June 2012 and 29 August 2013 refusing to vary leave to remain and giving directions for her removal under section 47 of the Immigration, Asylum and Nationality Act 2006.

3. The claimant is a citizen of Nigeria born 6 April 1949. The claimant's immigration history is somewhat convoluted. In summary, she last entered the UK on 8 October 2011 with entry clearance conferring leave to enter as a visitor until 22 February 2012. On 2 December 2011 she lodged an application for discretionary leave to remain. That application was refused on 20 June 2012. The claimant appealed and the appeal was subsequently dismissed by the First-tier Tribunal. As a consequence of an onward appeal the Upper Tribunal found an error of law in the decision and remitted the appeal to the First-tier Tribunal for rehearing. This resulted in a further decision to refuse being issued by the Secretary of State on 29 August 2013. The claimant lodged an appeal against that decision. On 27 August 2014 the First-tier Tribunal allowed the appeal to the extent that the decision was not in accordance with the law. The Secretary of State was successful in her appeal against that decision and the Upper Tribunal remitted the appeal to the First-tier Tribunal for rehearing. Thus the appeal came before Judge Macdonald.

The Judge's Decision

4. Essentially the claimant's case was that she lived with and was the primary carer of her mother who had a history of a number of chronic ailments and, in particular, suffered from dementia and Alzheimer's. If care was not provided the mother would need to be admitted into a care home. With the claimant's care there had been a slight improvement in the mother's health. The claimant had family in the UK comprising of two brothers and their respective families.

5. The Judge heard evidence from the claimant and her two brothers. The witnesses confirmed the role undertaken by the claimant in respect of their mother's care, and the burden that would be placed upon them if the claimant was no longer here to fulfil that role. Whilst there is no explicit reference to credibility it is apparent that the Judge accepted that evidence as true in view of his findings of fact at [44] to [51]. Therein, the Judge found that the claimant lived with her mother and provided her with *"very substantial care and attention".* In the absence of that care the mother would have to seek significant help either from Social Services or a care home. He noted that with the claimant's assistance there had been a slight improvement to the mother's health. Whilst the Judge observed that the care previously provided to the mother could be made available at expense, he was unable to find that such care would be better or significantly the same as that provided by the claimant. The Judge found

that the claimant had visited the UK lawfully as a visitor since 1973 and accepted the claimant had family in the UK.

6. It was against these findings of fact that the Judge proceeded to decide the appeal in accordance with the two-stage process he was required to adopt. The Judge noted that the applicable Immigration Rules were those in force on 20 June 2012 and thus prior to the implementation of HC 194 that took effect on 9 July 2012. In respect of the decision taken on 29 August 2013 the Judge found that the claimant failed to meet the requirements of Appendix FM. The Judge made reference to the Secretary of State's Carers Policy and noted some of the relevant particulars of that policy. In so doing the Judge observed the Secretary of State's failure to consider that policy when making her decision and thus found that the decision was not in accordance with the law [57]. The Judge went on to reject the claimant's claim that she was entitled to a Derivative Residence Card in accordance with EU law.

7. As for Article 8 outside of the Rules, the Judge found that the claimant had an established family life with her mother and siblings and found the mother was *"heavily dependent upon her daughter who provides all aspects of intimate daily care"* [65]. The Judge also found that the mother's health would deteriorate in the claimant's absence thus having a detrimental impact on the mother's private life [65]. The Judge was satisfied that the decision would seriously interference with family and private life. The Judge concluded that there were exceptional and compelling circumstances that indicated that the interference was not in accordance with the law. He made reference to the fact that intimate care could not be appropriately provided by the claimant's brothers and there were doubts as to whether they could provide the level of care required. Whilst the Judge acknowledged that care could be provided in a home, he concluded that such care would not be as good or appropriate in light of the mother's advanced age and deteriorating mental health, and that care provided by the claimant was most appropriate. The Judge noted in particular that the claimant had been the primary carer for the last 3 years and 7 months and that such care should continue in the interests of continuity.

8. The Judge had regard to section 117B of the Nationality, Immigration and Asylum Act 2002 (hereafter "the 2002 Act") and found that it was not in the public interest to remove the claimant who was of good character. He made reference to the claimant's immigration history and to the fact that she spoke English, and that, she was financially independent through the resources of her family in the UK. Accordingly, the Judge found that the decision of 20 June 2012 was not in accordance with the law and further allowed the appeal on human rights grounds.

9. The Secretary of State lodged grounds of appeal on 15 May 2015. The grounds argue, first, that the Judge made a material misdirection in law in

his analysis of the Article 8 argument; second, that the Judge misapplied the test in **Razgar [2004] UKHL 27** and conflated issues of proportionality with matters of law; and thirdly, failed to address the public interest considerations contrary to section 117B(1) and (5) of the 2002 Act. First-tier Tribunal Judge Reid granted permission to appeal on 15 July 2015.

Consideration and Conclusions

10. It is pertinent to commence with the Judge's finding that the Secretary of State's decision was not in accordance with the law on account of her failure to apply the Carers Policy to her consideration of the application. That failure the Judge found rendered the decision *"not in accordance with law".* The Secretary of State surmounts no challenge to that finding in her grounds and the Judge's decision allowing the appeal to this extent thus stands**.**

11. There is also no challenge to the Judge's factual findings. Those findings were clearly open to him on the evidence.

12. The Secretary of State's pleaded case is limited to the Judge's approach to his assessment of Article 8 of the ECHR. The Judge, rightly, sought to engage with the step-by-step process enunciated in the well known case of **Razgar**. He set out the five questions posed therein and considered each question in turn. In so doing, whilst I accept the criticism that some of the Judge's reasoning is muddled, for instance, first, at [80] in his omnibus conclusion in respect of proportionality he refers to the case of **Kugathas** and his reasons for finding dependency between the claimant and mother, which were better placed for consideration under the first question posed in **Razgar**; and second, the issue of compelling circumstances and the continuity of care were better placed for consideration under the proportionality assessment rather than under the question of the lawfulness of the decision [see 69-70], I am not satisfied that the Judge fell into material error. Upon a holistic reading of the decision it cannot be said that the Judge's analysis is irrational or perverse. The Judge did not take into account irrelevant factors and the weight that he attached to these factors either individually or cumulatively was a matter for him. The factors considered were of significance to the decision of which the Judge was clearly aware. I am satisfied that the Judge's decision is a sufficiently reasoned decision that was open to him on the evidence.

13. As for the public interest the Judge clearly had in mind the public interest in assessing the proportionality of the decision. He first turned his mind to that interest in his deliberations [74]. The Judge went onto identify that he must have regard to section 117B of the 2002 Act and this was followed by a finding that it was not in the public interest to remove the claimant [75]. He made reference to the fact that the claimant speaks English and

was financially assisted by her family. Whilst the Judge did not explicitly acknowledge the terms of 117B (5) in that: "Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious", I am not satisfied that this error is material given that it is apparent that the Judge allowed the appeal on the basis of family life and the substantial dependency upon the claimant by her mother [81].

14. In **Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC)** the Tribunal held that "(i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her".

15. In this case, the Judge could have, perhaps, expressed himself a little more clearly, however, when the decision is read as a whole, the Judge's findings are sustainable, sufficiently detailed and reasoned.

16. At the hearing Mr Duffy in amplifying the grounds introduced a point that was not argued in the grounds and upon which permission to appeal had not been granted. There was no application to vary the grounds of appeal. In essence he submitted that as the Judge found that the decision was not in accordance with the law that he erred in proceeding to consider the fourth and fifth questions in **Razgar**. As this is a fundamentally different ground of appeal for which permission to appeal has not been granted the Tribunal has no jurisdiction to consider it. Nevertheless, I see no unfairness and thus any error in the Judge's consideration of the factors relevant to intended removal.

17. For the reasons elaborated above, I affirm the decision of the First-tier Tribunal and dismiss the Secretary of State's appeal.

DECISION

18. The appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Bagral