



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17512/2016

**THE IMMIGRATION ACTS**

Heard at FIELD HOUSE  
On 4.9.2018

Decision and Reasons Promulgated  
On: 18.9.2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL  
G A BLACK

Between

MR GABRIEL OBASANMI EKUNYEMI  
& MRS COMFORT OLABISI EKUNYEMI  
NO ANONYMITY ORDER MADE

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms E Lanehin (Counsel)

For the Respondent: Mr C Avery (Home Office Presenting Officer)

**ERROR OF LAW DECISION AND REASONS**

1. This is an error of law hearing. The appellants appeal against the decision of First tier Tribunal (Judge Siddall) ("FtT") promulgated on 5<sup>th</sup> December 2017 in which the appellants human rights appeals were dismissed.

## **Background**

2. The appellants are citizens of Nigeria and were born on 20.8.1945 and 5.7.1950 respectively. They first entered the UK in 1974 and remained here until 1981 and then they returned to Nigeria. Mrs Ekunyemi returned to the UK in 2005 and her husband followed in 2007 both with visit visas. Applications for leave to remain on human rights grounds outside of the Rules were refused.
3. The respondent refused their applications because it was not accepted that they met the Rules under Appendix FM or that they would face very significant obstacles to reintegration to Nigeria under paragraph 276ADE (vi). They failed to meet the Eligibility requirements as they had no current lawful leave in the UK. There were no exceptional circumstances.

## **First tier decision**

4. The FtT considered whether the appellants would meet the entry clearance requirements for dependent relatives in section EC-DR [15] and thereafter considered if there were very significant obstacles to integration under paragraph 276ADE[31]. The FtT then followed **Razgar** in assessing Article 8 [35] and applied section 117B 2002 Act (as amended).
5. The FtT found [17-32] the appellants to be entirely credible and made positive findings of fact accepting that they had strong family ties with their 3 adult children in the UK. They lived with their daughter, Josephine, and their 3 grandchildren with whom they played an active role on a daily basis including doing the school run [25]. The FtT accepted that the second appellant had sustained a gunshot wound whilst in Nigeria and was extremely distressed about a possible return there [19 & 29]. It was accepted that she suffered from pain and depression but there was no expert evidence of any long term psychological harm [29]. The first appellant left Nigeria following an attack on him [22]. It was unclear if the appellants had a legal right to any property in Nigeria. The appellants had no accommodation available in Nigeria. They had no family in Nigeria [24]. They were in receipt of state pensions in the UK by reason of their past employment [18] and were subsidised by their children who paid for food, travel and gave them between £50-100 per month [26]. The grandchildren were in regular contact with their father who continued to play a role although he was living separately. It could not be said that the appellants had stepped into the role of parents [28].
6. The FtT concluded that if the appeal were to have considered the dependent relatives rules, they were not met [30]. But the FtT went on to conclude that in future it was possible that such an application could be successfully made.

## **Grounds of appeal**

7. In grounds of appeal the appellants argued that the FtT erred by placing insufficient weight on the strong family ties and the extreme distress that removal would lead to for the second appellant. There were inconsistencies by the FtT in finding that section 117B(1) & (3) applied but yet found that the appellants paid privately for their medical

care and they were given funds by their adult children [and were in receipt of a state pension](ground 1).

8. The FtT failed to give adequate reasons for concluding that the public interest outweighed the private interests and their strong family life (ground 2).
9. The FtT failed to apply the approach taken in R (on the application of **RK**) V SSHD (section 117B(6);parental relationship(IJR)(ground 3).
10. The FtT failed to properly consider section 55 Borders, citizenship & Immigration Act 2009.

### **Permission to appeal**

11. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ Hollingworth on 6.7.2018.

### **Submissions**

12. At the hearing before me both representatives made submissions, the details of which are set out in the record of proceedings and have been taken into account by me.

### **Discussion and conclusion**

13. Firstly, I gave permission to Ms Lahenin to amend her grounds of appeal. There was an obvious error by the FtT which had applied the wrong test under paragraph 276ADE(vi). In the main body of the decision the FtT referred to “insurmountable obstacles” [31] rather than the correct test “very significant obstacles.” The FtT then concluded that they would face “challenging” but not insurmountable obstacles. I am satisfied that this amounts to a material error of law as it could be argued that “challenging” equates to very significant obstacles.
14. In addition I am satisfied that the grounds are made out to the extent that the FtT placed insufficient weight on the strong family life and other compassionate circumstances.
15. The FtT erred in my view by concluding that there were compelling circumstances to justify consideration of Article 8 but thereafter the FtT felt “compelled” [45] to find in favour of the public interest in terms of proportionality. The FtT placed weight on the failure to meet the Immigration Rules in their entirety. I am satisfied that the FtT erred by taking into account the rationale behind the Immigration Rules when attaching weight to the failure to meet the Rules [44-45]. The FtT erred by focusing on the failure to meet the dependent relative rules in respect of which no application had been made. The Tribunal can take into account the extent to which the rules have not been met as part of the Article 8 assessment. This was a human rights appeal in which the FtT found compelling circumstances to go outside [my emphasis] of the Rules under Article 8. On any reading of the decision it is clear that the weight of the findings made by the FtT were in favour of the interests of the appellants (**Agyarko** [2017] UKSC 11.

16. The third and fourth grounds were not made out. The evidence before the FtT did not establish that the appellants had assumed parental responsibility for their grandchildren. The FtT properly took into account the active roles played by the appellants and considered the interests of the three grandchildren consistent with section 55 Borders, Citizenship and Immigration Act 2009 [46].

**Decision**

17. There are material errors of law in the decision which shall be set aside. The findings at 18-32, which were not challenged, shall stand. The error lay in the FtT's application of the law. The weight of the evidence was clearly in favour of the interests of the appellants and there was little under section 117B to counter the same.
18. The appeal is allowed. I substitute a decision to allow the appeal on human rights grounds.

Signed

Date 15.9.2018

GA Black

Deputy Judge of the Upper Tribunal

NO ANONYMITY ORDER

NO FEE AWARD

Signed

Date 15.9.2018

GA Black

Deputy Judge of the Upper Tribunal