



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

Appeal Number: IA/33224/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 October 2014**

**Determination**

**Promulgated**

**On 9 October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**MISS FOLAKE KUTI**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr D Sellwood, Counsel

For the Respondent: Miss A Everett, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant, a national of Nigeria, date of birth 4 March 1972, appealed against the Respondent's decision dated 18 July 2013 to refuse to vary leave to remain. The appeal against that decision came before First-tier Tribunal Judge Wellesley-Cole, who on 25 July 2014 dismissed the appeal seemingly with reference to paragraph 276ADE and Appendix FM of the Immigration Rules and with reference to Article 8 of the ECHR. Permission

to appeal that decision was given by First-tier Tribunal Judge P J G White on 14 August 2014. The Respondent made a response under Rule 24 of the Upper Tribunal Procedure Rules dated 28 August 2014.

2. Before the First-tier Tribunal Judge Mr Sellwood appeared and provided an extract from the skeleton argument which he put before the judge.
3. His primary submission was that at the date of application, 16 May 2012, the old Immigration Rules were in being and there was no direct provision for the Appellant's application and so it was made outside of the Rules with reference to Article 8 of the ECHR. The Rules were changed by the Statement of Changes of 13 June 2012 which came into effect on 9 July 2012.
4. In the submissions to the judge Mr Sellwood argued that because the application had been made before the Rules were changed the effect of the transitional provisions was that the matter should only have been considered with reference to Article 8 of the ECHR. In support of that he brought to the judge's attention the case of Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402 and in particular the court's interpretation of the implementation provisions which indicated that applications made before the Rules came into force on 8 July but a decision upon which had not been decided then it fell to be decided under the Rules as they were then.
5. It is fair to say that the Court of Appeal in Edgehill were not specifically taken to paragraph 277 of the amended Rules and in particular whilst 277A and B did not apply it was to be argued that it was open to the Secretary of State where the Secretary of State deemed it appropriate to consider an application to which the provisions of Appendix FM and paragraph 276ADE did not already apply so as to enable leave to remain on bases under the amended Rules.

6. That matter was neither taken to the attention of the judge in this case but more importantly it is clear from the reasons for refusal that the Secretary of State did not appear to be applying the provisions of paragraph 277C but had simply gone straight into the issue in the refusal letter of 18 July 2013 of paragraph 276ADE.

7. In relation to any other matters including Article 8 in a brief and unreasoned paragraph the Secretary of State said this:

“It has also been considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant consideration by the Secretary of State of grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules but it has been decided that it does not. Your application for leave to remain in the United Kingdom is therefore refused.”

8. First it is clear that the Reasons for Refusal Letter does not address the issue which by then had been obviously the subject of some consideration, namely consideration of the matter outside of the Rules, but rather the assumption that seems to have been made that because of the date when the decision was made the new Rules applied and so paragraph 276ADE was essentially the end of the matter.

9. It is clear that the judge dealing with the appeal did not deal with the primary submission of Mr Sellwood, namely that paragraph 276ADE had no application, and although the judge was positively informed that the Appellant could not meet those requirements the judge then went on in

the context of Gulshan [2013] UKUT 640 to look at Article 8 outside of the Rules.

10. What the judge then did it seemed to me from paragraph 10 to paragraphs 13 and 14 was to consider whether Article 8 was engaged and whether or not it was disproportionate to reject the Appellant's claim for leave to remain and by reason of the view that it was not disproportionate to conclude in a way which is self-evidently back to front in relation to the case law that there were therefore not the circumstances which were sufficiently exceptional or compelling or compassionate circumstances so as to look at the matter outside of the Rules.
11. A further sustainable criticism of the decision is that whilst the judge identified the important case of Razgar [2004] UKHL 27 the judge did not set out the five stages of questions posed to the conclusion as to whether or not the Respondent's decision was disproportionate. What there is is a melange of considerations in which ultimately it is extremely difficult to find clear findings save insofar as the judge rejected the argument that the Appellant had through her relationship with family members and particularly her aunt, effectively her mother, did not have a family life although such people may form part of her private life. The judge did not go on to assess the significance of interference in that private life and did not ultimately go on to make an analysis as to what extent the Respondent's decision was in accordance with the law or necessary to address the considerations arising under Article 8(2) of the ECHR. Ultimately, in a confusion of reasoning the judge concluded, seemingly engaging with the concept of exceptional circumstances to address proportionality, that the Respondent's decision was proportionate because there were no exceptional circumstances. The circularity of the argument is demonstrable from reading the determination. In the circumstances I therefore found in any event unfortunately that the determination did not disclose a freestanding analysis as required of Article 8 and it is noted and should be commented upon that the judge makes no discussion of the

public interest as part of her reasoning on the issue of proportionality. In these circumstances I am satisfied that the original Tribunal's decision discloses material errors of law and the original Tribunal's decision cannot stand.

12. Miss Everett could not because of her instructions make any concessions upon the correctness of the decision in Edgehill, which I infer is opposed by the Secretary of State. She did accept that the judge's reasoning gave every appearance of asking the questions in relation to looking at Article 8 outside the Rules the wrong way round in the light of the case law that the judge was evidently citing. I think her acceptance of that factual matter was undoubted and reasonable on her part.
13. In all the circumstances it seems to me, finding as I do that Edgehill is good law and binding upon me, that the appropriate course is to conclude that the Secretary of State made an error of law in considering the application outside of the Rules and has failed to address as the law then stood the position in relation to an Article 8 claim. Accordingly I find that the appeal is allowed to the extent that it is remitted to the Secretary of State to be remade in accordance with the law.

### **ANONYMITY**

No anonymity order was made nor was one sought or indeed I find appropriate.

### **TO THE RESPONDENT**

#### **FEE AWARD**

The judge made no finding in relation to a fee award but in the light of the appeal failing before the judge that does not make any material difference.

Signed

Date

Deputy Upper Tribunal Judge Davey