IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/04476/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 November 2015	**On 14 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

OLASUNKANMI ADEWOLE ASHAYE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER,
ABUJA

Respondent

Representation:
For the Appellant: Dr O Ashaye, sponsor
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Barcello dismissing the Appellant's appeal against a refusal of entry clearance as a family visitor, following a hearing at Newport IAC on 23 February 2015.

2. The Appellant is a citizen of Nigeria born on 13 February 1986. He made an application for entry clearance primarily to attend his brother's doctorate degree ceremony in the United Kingdom but also necessarily to

visit his brother and other family members present in the UK. The application was refused by the Entry Clearance Officer by way of a Notice of Immigration Decision dated 8 July 2014 with reference to paragraph 41(i), (ii), (vi) and (vii) of the Immigration Rules for reasons set out in the Notice of Immigration Decision.

3. The Appellant lodged an appeal against the Respondent's decision with the IAC. That right of appeal was restricted in the way, and for the reasons, set out at paragraphs 8 and 9 of the decision of the First-tier Tribunal. Essentially the Appellant was limited to pursuing his appeal on race discrimination grounds or on human rights grounds.

4. Before the First-tier Tribunal the Appellant's brother Dr Ashaye attended to give evidence in support of the appeal, and it is Dr Ashaye who has also attended before the Upper Tribunal to advance the Appellant's case. It is clear that the First-tier Tribunal Judge found the sponsor, the Appellant's brother, to be an impressive witness and seems to have accepted his evidence as to primary facts in its totality. The Judge sets out at paragraph 13 a number of findings based upon the evidence before him. Those findings are a matter of record and I do not propose to set them out again here.

5. Having made those primary findings of fact the Judge went on at paragraphs 15 and 16 of his decision to refer to the Immigration Rules. The Judge observes at paragraph 15: *"It is clear that I have no jurisdiction to hear an appeal against the substantive decision"*, but nonetheless goes on to state this at paragraph 16: *"It will be clear however from my findings above that had I done so I would have allowed such an appeal. In light of the evidence I have heard and observed I would not have considered the reasons for refusal sustainable."*

6. Nonetheless because the Judge had no jurisdiction to allow the appeal under the Immigration Rules he appropriately went on to consider the available grounds under the heading 'Race discrimination and Human Rights'. At paragraph 17 in respect of race discrimination he states: *"No grounds of appeal have been raised in respect of race discrimination. There is nothing apparent within the facts of the case that lead me to conclude such a challenge is arguable."*

7. Thereafter the Judge sets out at paragraph 18 the five **Razgar** questions and at paragraph 19 identifies that the case of **Razgar** was concerned with removal but that nonetheless the questions and the principles from which they derive are essentially the same in respect of an entry clearance application where human rights are in issue.

8. The Judge then goes on at paragraphs 20 and 21 to consider the particular circumstances of the Appellant with reference in particular to his relationship with his brother. Paragraphs 20 and 21 are the key paragraphs in the determination and accordingly I now set them out in their entirety:

> "20. Considering the first question, in **Kugathas [2003] EWCA Civ 31** the Court of Appeal adopted a fact-based approach to the existence of family life with attention on whether there were additional ties of dependency beyond the normal emotional ties between adults. I consider that in this case the relationship between the Appellant and Sponsor is such that it constitutes 'family life' within the meaning and purpose of Article 8. I am satisfied that there is a sufficient element of emotional dependency by the Appellant upon the Sponsor in that, particularly following the death of their last surviving parent the Appellant derives emotional support from his brother that probably extends beyond normal ties between adult siblings.
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> 21. Moving on to the second question raised in **Razgar** however, I do not find that the refusal of a visit visa has consequences of such gravity so as to potentially engage Article 8. The family life shared between the Appellant and Sponsor is one in which they have chosen to live on separate continents and is therefore not primarily shared on a direct basis and has not been for over 12 years."

I interject to note that the reference to *"12 years"* would appear to be a typographical error, Dr Ashaye confirming today that it is more like 20 or 21 years that he and his brother have lived in different countries. Continuing with the quotation:

> "The applicant's primary family and private life is exercised within Nigeria with those friends and family that reside there. The Sponsor's primary family and private life is exercised in the United Kingdom. The brothers have retained their family life by the use of modern technology and by visits to Nigeria by the Sponsor. That situation is not affected by the Respondent's decision to reject an application for the Appellant to visit the Sponsor for two weeks. Whilst it would be an instructive and enjoyable experience for the Appellant, that is not reason enough to engage Article 8. The Sponsor asserts that such a visit would be emotionally beneficial to the Appellant in light of him coming to terms with the loss of their father. I agree that it might, but only in the sense that the Appellant benefits from spending time with his brother, which could be exercised as has been done previously in Nigeria."

9. On that basis the Judge did not go on to consider the third and fourth **Razgar** questions, or the fifth **Razgar** question of proportionality, but dismissed the appeal under the ECHR and thereby dismissed the appeal in its entirety.

10. The Appellant seeks to challenge the decision of the First-tier Tribunal Judge by way of grounds drafted by Dr Ashaye. Those grounds, with respect, to a very large extent focus on factual dispute and primarily constitute a disagreement with the outcome in the appeal. In that context it is perhaps not surprising that in the first instance First-tier Tribunal Judge Pooler refused permission to appeal on 24 April 2015. However, on 6 July 2015 on a renewed application for permission to appeal Upper Tribunal Judge Pitt granted permission to appeal identifying an arguable issue in relation to the approach taken by the Judge to the Immigration

Rules and their potential relevance to the issue of proportionality. Judge Pitt makes the following comments in granting permission to appeal:

> "The FTTJ making it entirely clear at [13]-[16] that had an appeal on the basis of the substantive Immigration Rules been before him he would have allowed the appeal. Family life having been found to been established for the purposes of Article 8 ECHR, the fact of the Immigration Rules being met is a relevant and 'weighty' factor; see **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)**. The FTTJ did not weigh the fact of the Immigration Rules being met at all in the proportionality assessment at [21]. It is arguable that had it been taken into account the decision might have been different, there being other factors here such as the recent death of the father of the appellant and sponsor albeit the guidance in **Adjei (visit visas – Article 8) [2015] UKUT 0261** will also have to be considered when assessing if a material error of law arises."

11. Having had the opportunity to give further consideration to the case law cited in the grant of permission to appeal, and perhaps more detailed consideration than the circumstances of consideration of an application for permission to appeal might afford, I note the following in respect of the two decisions cited. The headnote in **Mostafa** is in the following terms:

> "In the case of appeals brought against refusal of entry clearance under Article 8 ECHR, the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control."

12. In **Adjei** the headnote reads as follows:

> "1. The first question to be addressed in an appeal against refusal to grant entry clearance as a visitor where only human rights grounds are available is whether Article 8 of the ECHR is engaged at all. If it is not, which will not infrequently be the case, the Tribunal has no jurisdiction to embark upon an assessment of the decision of the ECO under the Rules and should not do so. If Article 8 is engaged, the Tribunal may need to look at the extent to which the claimant is said to have failed to meet the requirements of the Rule because that may inform the proportionality balancing exercise that must follow. **Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC)** is not authority for any contrary proposition.
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> 2. As compliance with paragraph 41 of HC 395 is not a ground of appeal to be decided by the Tribunal, any findings concerning that will carry little weight, especially if based upon arguments advanced only by the Appellant. If the Appellant were to make a fresh application for entry clearance the ECO will, if requested to do so, have regard to the assessment carried out by the Judge but will not be bound by those findings to treat the Appellant as a person who, at least at the date of the appeal hearing, met the requirements of paragraph 41."

13. It seems to me clear from a reading of both of those headnotes, and having had regard to the body of the respective decisions, that in circumstances where - as here - the First-tier Tribunal Judge has found that

the second **Razgar** question could not be answered in the Appellant's favour the Tribunal does not reach the proportionality exercise under the fifth **Razgar** question, and so any evaluation or, as here, favourable conclusion, in respect of the Immigration Rules cannot assist the Appellant in his Article 8 appeal because it is only in the context of proportionality that such matters might became germane. On that basis I conclude that the grounds identified in the grant of permission to appeal as requiring further consideration do not upon that further consideration identify any error of law on the part of the First-tier Tribunal Judge.

14. Nonetheless Dr Ashaye urged upon me a reconsideration of the First-tier Tribunal Judge's conclusion in respect of the second **Razgar** question. However, in my judgment that was essentially an attempt to seek to retry the factual issues and the Judge's evaluation of the inferences to be drawn from the primary facts found (in respect of which there is no dispute) and in respect of which, as already observed, the Judge appears to have accepted at face value the evidence of the sponsor. It is no part of my jurisdiction at the 'error of law' stage to reconsider the factual findings or the evaluation of the First-tier Tribunal Judge of those facts and accordingly I decline to permit this hearing to be used as a device essentially to rehear the appeal.

15. For the avoidance of any doubt I consider the findings of the First-tier Tribunal Judge at paragraphs 20 and 21 to be both clearly and cogently expressed and reasoned. Whilst it might be said - and indeed Ms Everett makes the submission - that the finding at paragraph 20 in respect of family life could be characterised as being a generous finding, it is clear that the Judge has considered that finding through the perspective of the geographical distance between the Appellant and his sponsor brother. This is made clear at paragraph 21.

16. Accordingly I find no error of law in respect of the approach taken by the First-tier Tribunal Judge to the Appellant's appeal on human rights grounds.

17. The grounds of appeal to the Upper Tribunal drafted by Dr Ashaye make some reference to issues of discrimination. However, I note that the issue of discrimination was not raised as a ground of appeal before the First-tier Tribunal Judge, see paragraph 17. Nor was this the basis upon which Judge Pitt granted permission to appeal. Moreover, there seems to me nothing of substance in the references made in the grounds, and accordingly in all of the circumstances I do not seek to explore that matter any further.

18. Finally I should observe that the First-tier Tribunal Judge did indeed make positive findings in respect of the Immigration Rules albeit these were not matters upon which he was seized of jurisdiction - and indeed further to the observations in **Adjei** are matters that perhaps he should not have addressed prior to his consideration of the Article 8 issues. Nonetheless, having addressed them, it may well be that if the Appellant were to

represent himself for entry clearance in the future, and with the caveat expressed in the second paragraph of the headnote to **Adjei**, the favourable impression made upon the Immigration Judge by the sponsor and the Immigration Judge's conclusions in that regard may be accorded some considerable weight in any future application as to the ability of the Appellant to be supported in the United Kingdom, as well as the very obvious and clear faith expressed in him by his brother as to the likelihood of him returning home after a short visit to the United Kingdom. However, ultimately any further decision will be a matter for the decision-maker at the relevant time taking into account all of the available evidence at that time.

Notice of Decision

19. For the reasons given I find no error of law and in those circumstances the decision of the First-tier Tribunal Judge stands. The appeal remains dismissed.

20. No anonymity direction is sought or made.

The above represents a corrected transcript of an ex tempore decision given at the conclusion of the hearing.

Signed Date: 13 January 2016

Deputy Upper Tribunal Judge I A Lewis