IA/06165/2013
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Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard in Birmingham	**Determination Promulgated**
On 12 September 2013	**On 3 October 2013**

Before

UPPER TRIBUNAL JUDGE PITT

Between

RASHEED ABOLAJI OLAYANJU + 3

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jesurum, instructed by Alsters Kelley Solicitors
For the Respondent: Mr Hussein, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of Nigeria and was born on 4 June 1980. The other three appellants are his wife and two minor children. Their cases have been run in identical terms and for the purposes of this determination I refer only to the first appellant.

2. This is an appeal against the determination dated 27 June 2013 of First-tier Tribunal Judge Chohan which refused the family's appeal for leave to remain as Tier 1 migrants and on Article 8 grounds.

Background

3. The appellant came to the UK in 2005 as a student. He remained here in that capacity until 30 April 2009. He studied accountancy. On the 11th 2009 he was granted a further leave to remain as a Tier 1 (General) Migrant under the Points Based System (PBS). He obtained his accountancy exams and was made an affiliate member of the ACCA. He worked for St John Ambulance from October 2010 to May 2012. He has worked for University Hospitals Coventry and Warwickshire NHS Trust from May 2012.

4. The appellant's wife came to the UK in 2007 to study for a Master's degree in Business Administration at Coventry University. She and the appellant married on 19 December 2009. They have two children born in the UK on 12 August 2010 and 18 September 2012. The appellant's wife has worked at Coventry University since August 2011.

5. As indicated in their witness statements presented to the First-tier Tribunal, the appellant and his wife are professionals in permanent employment with a joint annual income of over £51,000. At the time of the decision they were planning to buy a house and looking in into the various education options for their children. The appellant is a valued employee, his NHS Trust providing a letter dated 22 August 2013 stating that he is a "key individual" and that:

> "A great deal of time has been invested in training Rasheed, which if he was forced to leave his job, I can honestly say would be a loss to this hospital."

6. On 3 November 2012 the appellant applied for further leave to remain as a Tier 1 (General) Migrant. On 30 January 2013 the respondent wrote to the appellant requesting evidence of his registration with HMRC and further evidence related to his self-employed earnings. On 6 February 2013 the appellant replied, indicating that the further evidence sought was not available. The respondent then refused the application on 18 February 2013 as the appellant did not meet the requirements of paragraph 245CA and paragraphs 19 (b) and 19SD (b) of Appendix A of HC 395 (the Immigration Rules).

7. It was conceded before First-tier Tribunal that the appellant could not meet the Immigration Rules. An argument that the decision was not in accordance with the law as the respondent had failed to apply her evidential flexibility policy properly was dismissed. The appeal under Article 8 of the ECHR was dismissed as it was not found that the appellant had shown that the decision amounted to a sufficient interference such that article 8 was engaged further, the principal often referred to as the second "Razgar" question.

Grounds of Appeal

8. Permission to appeal was refused on the first ground which related to a "wider duty of fairness" and that matter was not pursued before me.

9. I heard from Mr Jesurum and Mr Hussein on the second ground which challenged the decision of the first tribunal judge at [20] that the interference with the appellant's private life was not sufficient to engage Article 8 further.

10. It was my view that the First-tier Tribunal judge was clearly in error in finding at [20] that the threshold for engaging Article 8 further was not met. In AG (Eritrea) v SSHD [2007] EWCA Civ 801, the Court of Appeal held that, while an interference with private or family life must be real, the threshold of engagement (the 'minimum level') is "not a specially high one." The appellant has been in the UK lawfully for eight years, studying and working. His wife has been here five years, also studying and working. They married and had their children here. Both have the substantial ties to the UK through their work and community to be expected from a professional family. Their private lives are such that they must be found to meet the low threshold for engaging Article 8 further.

11. I found that this matter amounted to an error on a point of law such that the decision of the First-tier Tribunal on the second Razgar question should be set aside and re-made.

12. I proceeded to do so. It will be clear for the reasons set out above that I found that the decision interfered with the private life of this family sufficiently so as to engage Article 8 further.

13. The second and third Razgar questions not being in dispute, I proceeded to assess the proportionality of that interference. Mr Jesurum did not seek to argue that family life played a significant part in this appeal as the family will return together.

14. I accept all of the matters set out in [3] to [5] above weigh in favour of the appellant and his family in the proportionality assessment. The appellant and his wife have impressive educational and employment records. Their time in the UK, eight years for the appellant and six years for his wife, has been lawful and productive. The appellant is valued in his work place and his employer will have to invest time and funds in any replacement in order for them to be as valuable an employee as the appellant. Their return to Nigeria will entail much upheaval and expense as they re-establish themselves there after a long period living abroad. There was little evidence on the point but I accept that their employment opportunities and educational opportunities for their children may be less there but, given the professional backgrounds of the appellant and his wife, it did not seem to me that there could be a great difference.

15. It remains the case that the appellant and his wife have lived by far the majority of their lives in Nigeria and have significant ties there that will assist them, after the initial period of readjusting, to resume private lives of the same substance as they

have in the UK. They came as students and have completed the studies for which they came. They have only ever had limited leave. Their immigration status has never been such that they had a legitimate expectation of settling in the UK permanently.

16. Case law from Razgar [2004] UKHL 27 and Huang [2007] UKHL 11 onwards has consistently stated that it will be only a minority of case that can succeed under Article 8 where the Immigration Rules are not met. In Huang this was expressed in terms of the interference leading to "sufficiently serious" circumstances for those concerned.

17. It is not my view that the difficulties set out at [14] that arise from the decision bring this family within the "sufficiently serious" category even when all the positive factors in [13] are weighed fully in their favour. The need for an effective immigration system and the concomitant economic interests of the country outweigh the interference with their private life arising from the decision.

18. Mr Jesurum sought to argue that the decision was disproportionate or unlawful as it went beyond the minimum level of interference required to serve the legitimate end of enforcing effective immigration control and ensuring the economic well-being of the country thereby. The detriment to the public good here was very limited. It was merely that the appellant was not registered with HMRC as a self-employed person. The extremely small tax liability that arose once he had registered had been discharged. The immigration system could not be said to be made more porous or less certain by this family being allowed to remain. As I understood his argument, the lesser and correct level of interference necessary to achieve the legitimate aim would be allow the appeal.

19. With respect to Mr Jesurum, whose energy and legal acuity were obvious from his submissions, this appeared to me to be a "near miss" argument although expressed in different language. The weight to be given to the public interest side of the balance does not decrease or fall to be assessed differently because the failure to meet the Immigration Rules is minor; Miah v SSHD [2012] EWCA Civ 261 applies, see paragraphs [22] and [23] in particular. Being allowed to remain under Article 8 of the ECHR when they do not meet the Immigration Rules and where the circumstances of the family will not be "sufficiently serious" does undermine an effective immigration system. The logic of Mr Jesurum's argument is that anyone who complies with immigration control and the laws of the UK during a period of leave would be entitled to say that they should win their case under Article 8 if they do not meet the Immigration Rules by a small amount. That cannot be correct. There must be something more, namely "sufficiently serious" circumstances to justify a person remaining where the Immigration Rules are not met.

20. It was therefore my decision that the respondent's decision was a proportionate interference with the family and private lives of the appellant and his family. I therefore refused the Article 8 appeal.

Decision

21. The decision of the First-tier Tribunal on Article 8 of the ECHR contains an error on a point of law and is set aside.

22. I remake the Article 8 appeal as refused.

Signed:  Date: 23 September 2013
Upper Tribunal Judge Pitt