Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00429/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 19 August 2013	**On 5 September 2013**

Before

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

MS FUNMILOLA AMAO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Nicholson, instructed by Ajo Solicitors
For the Respondent: Mr McVeety, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria, born 2 November 1980. She first entered the United Kingdom on 8 June 2007 with leave to enter as a student, such leave being conferred until 20 August 2010. On 25 November 2010 the appellant was granted leave to remain in the United Kingdom as a Tier 1 (Post-Study Work) Migrant until 25 November 2012. She sought to further extend her leave, this time as a Tier 2 (General) Migrant, in an application of the 9 November 2012. On the 13 December 2012 the Respondent refused this application and, at the same time, made a decision to remove the appellant pursuant to Section 47 of the Nationality, Immigration and Asylum Act 2002. The appellant appealed these decisions to the First-tier Tribunal.

2. By way of a determination promulgated on 22 March 2013 Judge of the First-tier Tribunal Heynes allowed the appellant's appeal against the Secretary of State's decision to remove her. The respondent has not sought to challenge this conclusion, which in any event is entirely consistent with the decision of the Court of Appeal in Ahmadi [2013] EWCA Civ 512.

3. Judge Heynes dismissed the appeal brought by the appellant against the Secretary of State's decision to refuse to vary her leave; giving the following reasons for doing so:

> "7. The appellant accepts that she did not have a certificate of sponsorship. She claims that, having been a Tier 1 Migrant, she did not need to produce one. The Immigration Rules do not provide for such an exception. Paragraph 79D [of Appendix A to the Rules] states that no points for appropriate salary will be awarded if no certificate has been provided. I can only conclude that the appellant was correctly scored in relation to Appendix A.
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> 8. The appellant accepted that the bank statements that she had provided were three days short of the requisite period; a matter that she had subsequently rectified. However, whether or not the respondent ought to have exercised the evidential flexibility policy is neither here nor there given that the application could not succeed for want of a certificate of sponsorship.
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> 9. In view of the chronology, a decision to remove the appellant under s.47 was unlawful. Since the only valid decision is the refusal to grant further leave to remain, human rights issues do not arise."

4. The appellant sought permission to appeal to the Upper Tribunal on the following grounds:

   (i) the First-tier Tribunal Judge erred in failing to consider Article 8 ECHR;

   (ii) the First-tier Tribunal Judge erred in failing to make any "helpful directions to remedy the defect/error which he identified";

   (iii) the First-tier Tribunal Judge erred in failing to conclude that the UKBA had unlawfully failed to apply its evidential flexibility policy.

5. By way of a decision of 2 July 2013 Upper Tribunal Judge Eshun granted the appellant permission to appeal but limited such grant to the first of the aforementioned grounds.

6. Thus the appeal came before us.

Error of Law

7. At the outset of the hearing Mr McVeety conceded that the First-tier Tribunal's decision contained an error on a point of law, in that it failed to consider whether the Secretary of State's decision breached the Appellant's Article 8 ECHR rights. He further accepted that such error ought to lead to the determination of the First-tier Tribunal being set aside. We find such concessions to have been entirely appropriate and need say no more in this regard other than to cite the decision of the Court of Appeal in JM (Liberia) [2006] EWCA Civ 1402, which identifies that Tribunal does have jurisdiction to deal with human rights issues on an appeal against a decision to refuse to vary leave, irrespective of whether a decision to remove has been made.

8. Consequently, for this reason, we set aside the decision of the First-tier Tribunal. We informed the parties of this decision at the hearing and indicated our intention to re-make the decision ourselves. Whilst Mr Nicholson expressed surprise that the appeal

was not to be remitted to the First-tier Tribunal, he did not seek to persuade us to take that course.

Re-making of Decision on Appeal

9. We directed that the decision be re-made on Article 8 ECHR grounds alone. The First-tier Tribunal's decision made in relation to the Immigration Rules has not been the subject of successful challenge to this Tribunal and remains standing. Neither party sought to submit that such a course was not appropriate.

Evidence

10. We have before us a bundle produced by the Secretary of State for the Home Department dated 6 February 2013, which includes within it, *inter alia*, a copy of the application form completed by the appellant, extracts from the appellant's passport as well as copies of bank statements provided by the appellant with her Tier 2 application. We also have before us a bundle from the appellant, sent to the Upper Tribunal under cover of a letter of 13 August 2013, running to 59 pages. This bundle is indexed and we do not therefore repeat its contents herein.

11. We observed at the hearing that we were unable to read pages 7A and 8 of the appellant's bundle, due to the poor quality of the copying. These are each detailed in index to the bundle as *"letter from appellant's nieces"*. Mr Nicholson indicated that his copies of these documents were also unreadable; nevertheless, he did not invite us to adjourn the appeal to obtain better copies of these documents, neither did he seek to submit that we should receive better copies of these documents after the hearing.

12. The appellant was called to give oral evidence to the Upper Tribunal. In examination-in-chief she adopted the contents of her witness statements dated 4 March 2013 and 10 August 2013.

13. In the earlier of these statements the appellant sets out her immigration history in the United Kingdom and provides reason as to why the Secretary of State's decision of 13 December 2012 made in relation to the Immigration Rules was wrong in law. We pause to remind ourselves that this latter matter was resolved against the appellant by the First-tier Tribunal and has not been the subject of successful challenge before us.

14. The appellant continues by asserting that she is currently a healthcare worker in the United Kingdom and that her employment is on the occupation shortage list compiled by the Home Office. She has developed a therapeutic relationship with the service users, which has enabled her to gain their trust and respect. She also earns up to £20,000 per annum from Kingfisher Investments Limited, is the treasurer for a charitable organisation and assists in the organisation of community initiative programmes that help improve the local community. The appellant finally states that she has built strong ties with her nieces in the United Kingdom, her house being "their second home where they spend the weekend".

15. In her most recent statement the appellant observes that her sister has recently given birth, so that she [the appellant] now has three nieces in the United Kingdom. Her

sister is a mental health nurse and her brother-in-law is a dentist. They both have extremely demanding occupations and consequently her nieces spend a lot of time with her on her free days and in the evenings. She has developed a strong bond with her nieces. She takes them to school on occasion and also to the doctors, friends' houses, parties and shopping. She attends church on Sundays and takes her nieces with her. She cannot imagine life without her nieces and she misses them when she is not with them. She speaks regularly to them on the telephone. She, her sister and her brother-in-law mutually depend on each other for moral and emotional support, as well as spiritual guidance.

16. In her oral evidence the appellant further confirmed that she is currently a director of Kingfisher Investments Limited, having joined the organisation on 31 January 2011. In relation to her nieces, they telephone her "approximately five times per day".

17. Under cross-examination the appellant stated that her mother, father and sister still live in Nigeria, that she is not in a relationship in the United Kingdom and that she no longer lives with her sister in the United Kingdom having moved into her own accommodation in 2011, such accommodation being approximately a ten minute drive away from her sister's house. When she originally arrived in the United Kingdom it was her intention to return to Nigeria. She became aware of her sister's presence in the United Kingdom in early 2008, after her sister made contact with her. She does not wish to return to Nigeria because she has been in the United Kingdom for six years, has a good job here, and she takes good care of her nieces. Her nieces have no other family members from Nigeria living in the United Kingdom.

18. Ms Odubanjo was then called to give oral evidence, adopting when doing so the contents of a letter of the 12 August 2013 drawn in her name. In that letter Ms Odubanjo asserts that the appellant is the only family member she has in the United Kingdom. The appellant has a special bond with her [Ms Odubanjo's] children; she has helped to take care of them and has given them moral support. Whilst the appellant was living with them she would play with the children, take them to the park, and help them with homework. She provides a link for the children with their African heritage. She provides a source of inspiration for the eldest daughter, and the children look forward to each weekend when they enjoy seeing and spending time with the appellant.

19. Ms Odubanjo further stated, in chief, that her children would miss the appellant 'very much' and would be 'devastated' if the appellant were to leave the country. She was not cross-examined.

Submissions

20. Mr McVeety conceded that the appellant had established both a private and family life in the United Kingdom and submitted that the only issue for the Tribunal to consider was whether requiring the appellant to return to Nigeria would be proportionate to the legitimate aim of maintaining immigration control. Rather confusingly Mr McVeety then asserted that the appellant had failed to establish that there was in existence more than normal emotional ties as between her, her sister and her sister's family [the appellant's nieces and brother in law]. We attempted to clarify

with Mr McVeety whether, by the latter submission, he was in fact asserting that the appellant had not established family life with her sister and sister's family [see Kugathas [2003] EWCA Civ 31]. In response Mr McVeety maintained both the concession that the appellant had established a family life in the United Kingdom and his submission that she had not established the existence of 'more than the normal emotional ties'. We take these apparently contradictory submissions to mean that although it is accepted that the appellant has a family life in the United Kingdom, such ties should nevertheless be given limited weight when considering the issue of proportionality.

21. Mr McVeety then reminded us that the appellant did not meet the requirements of the Immigration Rules, that she had come to the United Kingdom with the intention of returning to Nigeria, that she had been living lawfully in the United Kingdom on only a temporary basis, had never been given the expectation that she was entitled to remain here indefinitely, still has ties to Nigeria and that she had accepted in her evidence that she could continue attending church in Nigeria.

22. In response Mr Nicholson invited us to allow the appeal on Article 8 ECHR grounds. He submitted that it was not "necessary" to interfere with the appellant's family life by removing her; in the alternative he asserted that it was not proportionate to do so. He reminded the Tribunal that the appellant had remained lawfully in the United Kingdom for some six years and had not engaged in any acts of criminality during that time. He submitted that it was in the best interests of the children, the appellant's nieces, for the appellant to remain in the United Kingdom; observing when doing so that the appellant has cared for the children for the past five years and is thought of as part of the family unit. There were, he asserted, no countervailing reasons for requiring the appellant to leave the United Kingdom contrary to the best interests of the children.

23. In relation to the relevance of the appellant's failure to meet the Immigration Rules, Mr Nicholson submitted that little weight should be attached to this fact, given that the reason for her failure to comply with the Rules was not of her own making but rather a change in the Rules themselves.

Findings and Reasons

24. Article 8 provides, so far as is relevant, that;

> "1. Everyone has the right to respect for his private and family life....
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

25. When considering Article 8 we remind ourselves of the opinion Lord Bingham in Razgar [2004] UKHL 27, [2004] INLR 349 in which he identified a number of questions that decision makers have to ask themselves, on a step-by-step basis, when Article 8 grounds are being considered. These questions are:

"(1) Will the proposed removal be interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life.
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
(3) If so, is such interference in accordance with the law?
(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved"

26. The burden of proving that Article 8 is engaged is upon the appellant. The standard of proof is one of balance of probabilities. If the appellant demonstrates, to the requisite standard, that Article 8 is engaged, it is for the Secretary of State to justify interference with the protected right. The burden of proving the relevant facts relied upon remains with the appellant throughout, even at the proportionality stage of the consideration.

27. We have set out above the appellant's immigration history in the United Kingdom. She has lived here continuously for just over six years. We accept that she has been working as a care worker for the same partnership since June 2007, originally as "bank staff" and, from February 2012, as a permanent member of staff. We further accept that she joined Kingfisher Investments Limited as a director on 31st January 2011 and has worked part-time for the company since that date. She is also a regular attender at the Mountain of Fire and Miracle Ministries in Liverpool and the treasurer of a charitable organisation.

28. Having considered and applied the decisions of the Court of Appeal in Kugathas and ZB (Pakistan) v SSHD [2009] EWCA Civ 834 we agree with Mr McVeety's concession that the appellant has a family life with her sister and her sister's family unit. There is no dispute that the appellant's relationship with her sister in the United Kingdom began in 2008 and that for a period of time the appellant lived with her sister and her sister's immediate family.

29. The appellant's nieces are, respectively, aged 10 years, 7 years and 5 months. We accept that the appellant has formed a close bond with her nieces, in particular with the elder two nieces. She has in the past resided in the same house as them and, since 2011 when the appellant moved out of her sister's accommodation, has regularly cared for them. We accept in particular that the elder two nieces spend weekends with the appellant and that she has, on occasion, taken them to school. Both the appellant's sister and her sister's husband work full-time in demanding occupations and the family unit function as a whole with the appellant stepping in to care for her nieces as and when required, although she is, of course, also in full time employment.

30. We further accept that by requiring the appellant to return to Nigeria there would be an interference with the appellant's private and family life in the United Kingdom and that such interference would be of sufficient severity so as to engage Article 8.

31. It has not been suggested that by refusing to vary the appellant's leave to remain the Secretary of State had acted otherwise than in accordance with the law (in the wider sense given to this phrase when the ECHR is under consideration).

32. Mr Nicholson invites us to separately consider whether or not the interference with the appellant's private and family life in the United Kingdom is necessary. The necessity test under Article 8 is explained in a long series of authorities, including the case of Uner v The Netherlands [2007] 45 EHRR 14. Decisions requiring an individual to leave the United Kingdom must be taken in accordance with the law and be necessary to a democratic society: that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. It cannot be disputed that the maintenance of effective immigration control is a legitimate aim. Although there is no basis for saying that this appellant would be a drain on the economy if she were to remain in the United Kingdom, a fact we have borne in mind throughout, that justification does not have to be fact-specific. As Elias LJ stated in SSHD v Treebhowan [2012] EWCA Civ 1054 at 76

> "[i]t would wholly undermine effective immigration control if the Secretary of State had to discharge such a burden, identifying a specific risk with respect to each applicant who is asserting an Article 8 claim outside the Rules. It would also be inconsistent with the observation of Lord Bingham in Huang … paragraph 20 to the effect that in practice it would be relatively rare for Article 8 claims to be sustained when an appellant could not remain in the United Kingdom in accordance with the Immigration Rules themselves".

33. Our focus must be on the question of whether requiring the appellant to return to Nigeria would, on the facts of this case, be proportionate to the legitimate aim pursued.

34. It is to that consideration that we now turn. The public interest in a firm and fair system of immigration control is considerable [EB (Kosovo) per Lord Bingham at (10)]. We remind ourselves that the appellant has been found not to meet the requirements of the Immigration Rules. As Mr Nicholson observes, she fails to do so; not because of any positive action on her behalf which led her to fall outwith the Rules, but as the consequence of the fact that the Rules have been subject to change such that she can no longer meet the requirements laid down therein. Nevertheless, the fact that the appellant does not satisfy the Immigration Rules is a matter of some weight in our considerations. The appellant has remained in the United Kingdom lawfully since her entry here in June 2007 but at no point has she been given an expectation that she would be entitled to remain here indefinitely.

35. When considering the issue of proportionality we must consider the rights of the appellant's family unit as a whole (Beoku-Betts v SSHD [2009] 1 AC 115). In doing so, we have taken into account that it is the interests of the appellant's sister and brother-in-law that the appellant remain here. We have no doubt that the family unit would function better with the appellant in the United Kingdom and we have no doubt that in the absence of the appellant, her sister and brother-in-law would have to find other carers, likely to be in the private sector, for their children.

36. We find that it is in the best interests of the appellant's nieces that the appellant remain in the United Kingdom as a part of their family unit here. We have detailed above the relationship the appellant has with her nieces, accepting that she has a strong bond with them. They would, we have no doubt, be distressed by her departure. They would also lose both the moral and emotional support the appellant provides to them, as well as an important connection to their cultural heritage. We have treated the best interests of the children as a primary consideration.

37. As to the appellant's employment with Kingfisher Investments Limited there is no information before us to suggest that this company could not continue operating, as it presently does, in the absence of the appellant, perhaps by hiring someone with similar skills to the appellant. In relation to her job as a carer, there is no information before us that the partnership she has been working for since the middle of 2007 could not employ another carer to take over the appellant's duties. We take into account that the appellant is likely to have developed relationships with the persons she is caring for but there is no evidence before us that any of those persons would suffer a significant detriment if another suitable professional were to take over their care. Again, whilst we accept that the appellant is a treasurer of a charitable organisation, there is no evidence before us to support a conclusion that an alternative treasurer could not be found if the appellant were to leave the United Kingdom.

38. The appellant's parents and sister live in Nigeria and the appellant has lived there for the majority of her life. She has obtained skills and qualifications in the United Kingdom and it is not suggested that she could not make use of these in Nigeria. She accepts that she could continue her religious activities there.

39. Looking at all the evidence before us in the round, and despite what we say about the best interests of the appellant's nieces and the fact that the appellant has formed a cohesive part of a family unit in the United Kingdom and that she has remained here lawfully for six years establishing stable employment here, we, nevertheless conclude that requiring the appellant to leave the United Kingdom would be proportionate.

40. The appellant came here in a temporary capacity, does not satisfy the Immigration Rules and has never been given an expectation that she could remain here indefinitely. The best interests of the appellant's nieces do not operate as a trump card. The children's interests are not to be treated as *the* primary consideration but *a* primary consideration. We confirm that when coming to our conclusion we have not treated any other consideration as inherently more significant than the best interests of the children, however, having looked at all the facts of this case in the round, we conclude that, despite it being the best interests of the children that the appellant remain in the United Kingdom, it is proportionate to remove her to Nigeria.

41. At the risk of repeating ourselves, we accept that the reliance placed on the appellant by her sister and brother-in-law, in relation to the care of her nieces, would be lost; as would the moral and emotional support and the cultural benefits that the appellant brings to the family unit. We also accept that the children would be extremely upset by the appellant's departure from the United Kingdom. However there is no medical

evidence before us to support a conclusion that the appellant's departure would lead to any long term psychological difficulties for the children or indeed that it would have any adverse impact on their education or long term development. The children would be remaining in the United Kingdom with their caring and responsible parents in a fully functioning family unit.

42. The consequences to the family unit of the appellant leaving the United Kingdom, even when taken together with all other matters to be weighed positively in the appellant's favour, do not, in our conclusion, outweigh the public interest in requiring her to leave.

Decision

For the reasons given above we set aside the First-tier Tribunal's determination of the appellant's appeal against the Secretary of State's decision to refuse to vary her leave. Having re-made the decision on appeal for ourselves we dismiss the appeal both on Immigration Rules and Article 8 ECHR grounds.

The decision of the First-tier Tribunal, made in relation to the appeal against the Secretary of State's decision to remove the appellant, remains standing; that appeal having been allowed.

Signed:

Upper Tribunal Judge O'Connor

Date: 24 August 2013