Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08500/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 5 March 2014	**On 12 May 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DEANS

Between

MISS JEANNE MARGARET BOUZA ROSE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Caskie, Advocate instructed by Maguire Solicitors
For the Respondent: Mr R Parkinson, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Mozolowski dismissing the appeal under the Immigration Rules and under Article 8. The appellant is a citizen of the USA. Her appeal is brought against a decision dated 28 February 2013 by the respondent refusing to vary leave as a Tier 1 (Entrepreneur) Migrant.

2) The appellant's immigration history is unusual. She worked as a teacher in New York State until she retired in May 2010. Her first visit to the UK was in 1980 and she returned in 1983 as a Fulbright Teacher Exchange Scholar. She taught in Paisley for one year. She met her husband, a British citizen,

whom she married in 1986. The couple divorced in 2004 and they have no children.

3) The appellant and her husband visited the UK on a regular basis and their visits included Orkney. In 2004 the appellant decided to set up art workshops and tours of Orkney for American visitors. She set up a business to this effect and every summer from 2005 to 2008 she took groups of people interested in art to Orkney. The enterprise was not, however, profitable and she ceased this activity. In the summer of 2009 she came to Orkney to curate an exhibition of two local artists. She then found out there was a scarcity of supply teachers in Orkney and, given the appellant's experience, she felt she could provide help. She obtained a provisional teaching certificate from the General Teaching Council of Scotland and a Tier 1 (General) Migrant visa, on the basis of which she came to Orkney in November 2010. Unfortunately, owing to the severe winter that year the appellant was unable to travel from her house in Orkney to take up supply teaching posts because she was snowed in. She spent the time painting while maintained by her US teacher's pension. In the spring of 2011 the appellant moved to Stromness, where she started supply teaching and continued with this through 2012. She also joined in community activities, such as choir singing, country dancing, Scottish Women's Rural Institute activities, story telling, volunteering on archaeological digs, writing articles and attending evening classes. The appellant's activities in Orkney were covered in the local media and in specialist publications on travel and art in the USA. In May 2012 the appellant rented a shop in Stromness High Street to convert it into a studio. From there she started to run art courses for tourists and display works by Orkney artists and craftsmen. The lease on this property was to run until December 2013 but the enterprise was not profitable.

4) The appellant sought further leave to remain in order to spend more time in Orkney. She did not want a full time job and she did not wish to deprive an Orcadian of a job. There remains a shortage of supply teachers. The Orkney Islands Council is not able to offer the appellant a supply teaching contract, however, as a regular amount of supply teaching is not available. It was conceded before the First-tier Tribunal that the appellant could not meet the requirements for leave as a Tier 1 (Entrepreneur) Migrant.

5) The Judge of the First-tier Tribunal considered the appellant's right to respect for her private life in terms of Article 8 but found that it would not be disproportionate to require the appellant to return to the USA.

6) Permission to appeal was granted on the basis that it was arguable that the Judge of the First-tier Tribunal had not properly carried out the balancing exercise between the public interest and the appellant's right to private life. In particular, the judge did not give adequate consideration to the community value contributed by the appellant, in terms of UE (Nigeria) [2010] EWCA Civ 975.

7) At the hearing before us Mr Caskie submitted on behalf of the appellant that the Secretary of State had excused and condoned breaches of immigration control by the appellant over many years. He referred to the activities and immigration history set out in the appellant's witness statement.

8) For the respondent, Mr Parkinson submitted that it was not necessarily the case that the Secretary of State was aware of the breaches of immigration control or condoned them.

9) For our part we were concerned by the approach taken by the Judge of the First-tier Tribunal to the balancing exercise under Article 8. At paragraph 21 of her determination the judge stated as follows:

> "Also, it has to be considered that the public interest in this case is in maintaining fair but firm immigration control and that is a vital interest which cannot be overstated. Usually public interest is an interest which will prevail over the private interests of individuals."

10) While the second sentence of this excerpt is not objectionable, the first sentence contains a clear error of law. In carrying out the balancing exercise under Article 8 it is necessary to balance the interference with the individual's right to private or family life against the public interest. This balancing exercise has to be conducted for each individual case where Article 8 is engaged, according to the facts and circumstances of the case. Sometimes the interference will be serious, sometimes it will be slight. Sometimes the public interest will weigh heavily but other times it will weigh much less so. To state as a matter of law that in this balancing exercise the public interest "is a vital interest which cannot be overstated" is an error of law which coloured the balancing exercise conducted by the judge.

11) Normally, of course, the balancing exercise is a matter for the judge and were it not for the misdirection in paragraph 21 it would be difficult to say that the judge had not done everything she was required to do. The judge's error of law has, however, affected the way in which she carried out the balancing exercise. Accordingly her decision in respect of Article 8 is set aside to be re-made by us through carrying out the balancing exercise afresh.

12) The point was made by Mr Parkinson that the Secretary of State did not condone the previous breaches of immigration control by the appellant. That must be, we suppose, an assertion that the Secretary of State was not aware of the very public activities of the appellant, as an alien in the United Kingdom, with leave variously renewed by her and her predecessors. In any event, in making the present decision the Secretary of State evidently took no account of the appellant's longstanding involvement in the community in Orkney and her close links with that community. Over the years the appellant has developed a very significant private life in Orkney involving not only links with individuals but with the arts and with education. The appellant is financially self-sufficient and she has invested her own money in fostering artistic activities in Orkney. Given the appellant's history

of involvement in the Orkney community and her use of her own resources for this purpose we are not persuaded that the serious interference in the appellant's private life arising from the refusal decision is outweighed by the public interest. We would stress that this is a highly unusual case involving a well-qualified individual with particular interests closely engaged over a lengthy period in an island community but we are satisfied that on its facts and circumstances the appeal should be allowed on the basis that the refusal decision is disproportionate.

13) No fee award was made by the Judge of the First-tier Tribunal because the appeal was dismissed. No application for a fee award was made before us and, given the circumstances of this appeal and its unusual features, we do not consider that it would be appropriate to make a fee award.

Conclusions

14) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

15) We set aside the decision.

16) We re-make the decision in the appeal by allowing is under Article 8.

Anonymity

17) The First-tier Tribunal did not make a direction for anonymity and we do not consider that an order to this effect is required.

Fee Award Note: this is not part of the determination

In the light of our decision to re-make the decision in the appeal by allowing it, we have considered whether to make a fee award but, for the reasons set out above, we make no award.

Signed Date

Upper Tribunal Judge Deans