



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18751/2014

THE IMMIGRATION ACTS

Heard at Field House, London
On 4 November 2014

Determination Promulgated
On 16 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

OTOBONG AMAOWOH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ramzan, Great James Street Chambers

For the Respondent: Mr Judge Parkinson, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a national of Nigeria, appealed to the First-tier Tribunal against the decision of the Secretary of State to refuse his application for leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points Based System and to remove him from the UK. First-tier Tribunal Judge Kempton dismissed the appeal and the appellant now appeal with permission to this Tribunal.
2. In a decision dated 7 April 2012 the respondent said that the appellant failed to achieve any points under Appendix A, B or C of the Immigration Rules.

The main reason for the failure to achieve the relevant points is that the appellant submitted a copy letter from Zenith Bank, Appendix A requires that such a letter should be an original, and that letter did not, as required, confirm that the bank is regulated and confirm that the funds were transferable to the UK. Further, the appellant failed to submit the appropriate Companies House Current Opportunities Report. He also did not produce the required evidence to achieve points for English language.

3. The appellant submitted further evidence to the First-tier Tribunal for the purposes of the appeal. The First-tier Tribunal Judge said that she could not consider the evidence from Companies House as it post-dated the decision. The correspondence from Zenith Bank also post-dated the decision and in any event the Judge said that the letters did not contain the information required by paragraph 41-SD of Appendix A of the Rules. The Judge went on to say [20];

“There was mention in the grounds of appeal of ECHR. However, there was no cogent argument before me to demonstrate that there is any real claim in terms of Article 8. I have insufficient evidence to consider such an issue.”

4. The grounds of appeal to the Upper Tribunal contend that the First-tier Tribunal Judge erred in excluding the new material and that she should have had regard to all of the evidence. It is further contended that she erred in giving no reason for dismissing the appeal on human rights grounds of appeal. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge PJM Hollingworth on the ground that it was arguable that the Judge should have considered whether there were arguably good grounds to go on to consider Article 8 and if there were the extent to which the factors advanced in the case should be weighed in the proportionality exercise.

Error of Law

5. Mr Ramzan submitted that the skeleton argument before the Judge asserted that the appellant had established a private life in the UK since 2010. However Mr Parkinson submitted that apart from the assertion in the skeleton argument there was nothing before the Judge as to the appellant's private life. He submitted that there was no evidence as to the nature, depth and scope of the appellant's private life and nothing to show that any private life was of such significance as to engage Article 8. He submitted that in those circumstances the Judge was entitled to conclude as she did.
6. The thrust of the contention in the skeleton argument before the First-tier Tribunal and the grounds of appeal to the Upper Tribunal is that the appellant could show, at the date of the hearing, that he met the requirements of the Immigration Rules. However the Judge rightly excluded the new evidence as she was bound to do under section 85A of the Nationality, Immigration and Asylum Act 2002.

7. In considering the question as to whether the appellant can benefit from a 'near miss' I have taken account of the guidance given by the Upper Tribunal in Nasim and others (Article 8) [2014] UKUT 00025 (IAC) where the Tribunal said;

“23. We addressed the issue of "near-miss" at [42] to [46] of Nasim and Others. So far as concerns its relevance to Article 8, it is unnecessary to say more than the following. What Lord Carnwath held at [55] and [56] of Patel and others was that certain "near-miss" arguments are, on analysis, appeals to core Article 8 elements, such as "family values", which underpin the criteria of the particular Rule that the appellant has narrowly failed to meet. In other words, the focus in such cases is not on the "near-miss" but, rather, on the significance of the relevant Article 8 element.”
8. This means that a near miss is not of itself enough to justify a favourable outcome for the appellant in a proportionality assessment under Article 8. There must be an impact on a core element of Article 8.
9. The appellant's witness statement talks about his immigration history, the evidence he was submitting and his plans for his business. There is no other evidence in the appellant's bundle as to the nature and extent of any private life. There is nothing in the Judge's decision to indicate that the appellant gave oral evidence as to the nature and extent of any private life. It has not been claimed that the Judge failed to take account of any evidence before her.
10. In these circumstances the only factors which could have taken the Judge into a full assessment of Article 8 were the appellant's four year stay in the UK as a student and post-study work migrant and the fact that he had produced further evidence in relation to his application under the Immigration Rules. The Judge in any event did not accept that this evidence demonstrated that he would have met all of the requirements of the Immigration Rules.
11. Recent case law including R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC), Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) and R (MM & Others) v SSHD [2014] EWCA Civ 985 make it clear that there is a need to look at the evidence to see if there is anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim.
12. The only feature which had not been adequately considered under the Immigration Rules in this case was the fact that the appellant did not provide the specified evidence at the date of the application to demonstrate that he met the requirements of the Immigration Rules. However the Judge was fully aware of this and recommended that the appellant make a new application. There were no other factors not considered by the Judge. There was no evidence as to the nature and extent of the appellant's private life.

There was insufficient evidence that the appellant has established a private life and that the respondent's decision will interfere with any private life.

13. Whilst the Judge did not expressly say that all matters had been considered by her it is clear that they were. There was clearly nothing in the evidence before her which could lead to a successful Article 8 claim. I am satisfied that the Judge was entitled to conclude that there was no good reason in these circumstances to go on to conduct a full Article 8 assessment.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of an error on point of law.

Signed

Date: 15 December 2014

A Grimes

Deputy Judge of the Upper Tribunal