Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29609/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 June 2014	**On 3 June 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Rasidat Olabisi Oseni
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr N Aborisade, of OA Solicitors
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Rasidat Olabisi Oseni, date of birth 21.4.42, is a citizen of Nigeria.

2. This is her appeal against the determination of First-tier Tribunal Judge Cockrill, who dismissed her appeal against the decision of the respondent, dated 4.7.13, to refuse her application made on 9.8.12 to vary leave to remain and to remove her from the UK pursuant to directions issued under section 47 of the Immigration Asylum and Nationality Act 2006.

3. The Judge heard the appeal on 7.2.14.

4. First-tier Tribunal Judge White granted permission to appeal on 9.4.14.

5. Thus the matter came before me on 3.6.14 as an appeal in the Upper Tribunal.

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Cockrill should be set aside.

7. The relevant background to the appeal can be summarised as follows. The appellant previously had indefinite leave to enter. Her spouse died in 1972 and her leave was revoked in 1978, apparently because she had been out of the UK for over a year. Since then she has regularly visited her children in the UK as a family visitor.

8. Since 2002, as set out in the chronology prepared by the respondent, the appellant has been back and forth between Nigeria, the UK and also to the USA, where her third son resides. She was issued a multiple entry visa on 17.3.2008, valid to 17.3.13 and her last period of leave on entry was granted on 13.7.12, for a period of 180 days. The application for indefinite leave to remain on the grounds of long residence was made under paragraph 276B of the Immigration Rules, which requires a period of 10 years continuous lawful residence. It was refused because she failed to demonstrate continuous residence as defined under paragraph 276A(a); her residence in the UK was not unbroken.

9. The respondent also considered the appellant's circumstances under paragraph 276ADE of the Immigration Rules but concluded she did not meet those requirements in relation to continuous residence or having no ties to her home country.

10. At §38 of the determination, Judge Cockrill found that the appellant could not meet 276ADE, given that she was renting a property in Nigeria and was back and forth to Nigeria over the years. At §56 the judge noted that the appellant had chosen to spend significant periods of time outside the UK. At §62, the judge found that the appellant could not meet the requirements of the Immigration Rules and proceeded to consider the appellant's circumstances under article 8 ECHR private and family life. The appeal was dismissed on all grounds.

11. The grounds of appeal, as explained by Mr Aborisade appear to be:

    (a) that the judge failed to address 276ADE(vi) in relation to the retention of ties to Nigeria; it is asserted that the appellant has lost all ties to Nigeria;

    (b) That the appellant appealed on the basis that paragraph 317 should have been considered, on the basis of an adult dependant of a person settled in the UK;

    (c) That under article 8 ECHR the appellant's medical conditions are that she cannot return to Nigeria and continue going back and forth between Nigeria and the UK;

12. In granting permission to appeal, Judge White was satisfied that in reaching his decision the judge arguably made an error of law for the following reasons:

(a) "At paragraph 50 of the determination the judge finds that the appellant does not meet Paragraph 276ADE based on the fact that "the continuity of residence has been broken by the appellant being away from this country."

(b) "The judge, however, makes no finding as to whether (if the appellant has continuously lived in the UK for less than 20 years) the appellant has no ties with Nigeria (see Paragraph 276ADE(vi))."

13. In the Rule 24 response, the Secretary of State submits that the First-tier Tribunal Judge directed himself appropriately. "The appellant arrived in the UK in 2012 on a visit visa. The First-tier Tribunal Judge found that the appellant had been travelling back and forth to Nigeria over the years maintaining a property there. The First-tier Tribunal Judge also noted the gaps when the appellant was outside the UK as set out at paragraph 37 of the determination. It is clear that the appellant has not been living continuously in the UK for at least twenty years. There is no material error of law in the First-tier Tribunal Judge's decision."

14. At the outset of the hearing Mr Aborisade, who represented the appellant at the First-tier Tribunal appeal, sought leave to adduce further evidence under Rule 15 in relation to the appellant's medical condition. This is evidence that was not before the First-tier Tribunal Judge. I explained that I would not grant leave at this stage as we were considering whether there was an error of law in relation to the decision of the First-tier Tribunal, based on the evidence then before the judge. Further evidence may be relevant if I set that decision aside and decided to remake it in the Upper Tribunal.

15. Mr Aborisade accepted that the appellant did not and could not meet paragraph 276B of the Immigration Rules, as her residence was not unbroken. That was the application for leave to remain on the basis of long residence. For the same reason, he also accepted that the appellant could not meet the residence condition of 276ADE. Those parts of the determination were not challenged.

16. For the reasons set out herein, I find that there was no material error of law in the making of the First-tier Tribunal decision such as to require the decision to be set aside and remade.

17. In relation to 276ADE(vi), whilst I accept that the judge did not explicitly state that 276ADE(vi) was not met, the ties test, it is clear from a reading of the determination that was the judge's intention and that it was the inevitable conclusion on the evidence that the appellant failed to demonstrate that she had lost all ties with her home country, including family, social and cultural.

18. At §38 of the determination the judge recited the submission of the respondent that because the appellant had been back and forth to Nigeria she could not be said to have severed all ties with Nigeria, where she also maintained a property. Her witness statement claimed that she had decided to stay in the UK because she did not have anybody in Nigeria and that as her health had deteriorated there was no one to look after her. She claimed that her colleagues and close relatives had died. Although not mentioned in the statement, I was also told that she had now sold her home in

Nigeria and at §58 the judge noted that she was now renting property in Nigeria. At §47 the judge noted that the appellant wanted access to UK medical facilities as she had a number of medical conditions.

19. Reading §56, §59 and §64 of the determination together, it is clear beyond dispute that the appellant has retained ties to Nigeria, including maintaining a home there, even if rented. The judge referred to the pattern of the appellant's life, coming back and forth between Nigeria and the UK. At §60 the judge found that the appellant does not meet the requirements of the Immigration Rules under 276ADE. Even if there is an error in failing to state it in plain terms, it is inevitable on the judge's findings of fact that the appellant could not demonstrate that she had lost all ties, including family, social and cultural with Nigeria. To suggest otherwise flies in the face of the patently obvious. That the appellant no longer wishes to reside in Nigeria is also obvious, but that alone or even selling her home does not entitle the appellant to remain in the UK as a matter of choice and certain does not mean that she can unilaterally severe ties to Nigeria on will.

20. Whilst the judge failed to specifically set out a finding in relation to ties to Nigeria, I find that it is implicit in the determination and even if it is not, there would be no point in setting the determination aside only to dismiss it again by specifying that the appellant has failed to demonstrate that she no longer had ties to Nigeria, including family, social and cultural. Thus whilst there may have been an error of law in this regard it was not material to the outcome of the determination, as the appeal would still have been dismissed if the error were to be corrected.

21. The judge has also considered the alleged claim in relation to dependant adult relative. There was no such application, but it was raised in the grounds of appeal to the First-tier Tribunal, wrongly referring to paragraph 317. As this was an application made on 9.8.12, the relevant provisions are those within Appendix FM, summarised by the judge at §39 to §40 of the determination, including the submission of the respondent at §41 that the medical evidence was insufficient to demonstrate that the appellant met the requirement and it had not in fact even been asserted by the appellant that she did do so. At §60 of the determination the judge refers to those submissions in noting that the appellant could not meet the adult dependant relative criteria of E-ECDR. This is also taken into account at §61 where the judge considers whether the appellant's circumstances amount to a Chikwamba situation, sending the appellant back to Nigeria when her application as a dependant relative would undoubtedly succeed. In fact, the judge said it was not as clearly cut that she would be able to meet the dependent relative criteria. That the appellant did not meet these specific criteria was set out clearly at §62 of the determination.

22. The judge went on from §62 onwards to consider the appellant's circumstances outside the Immigration Rules on the basis of article 8 ECHR. Given that this decision was made in February 2014, after the promulgation of MF (Nigeria) in the Court of Appeal and Gulshan in the Upper Tribunal (which the judge referenced at §65), it could be argued that the judge should not have gone on to consider article 8 without first finding that there were arguably good grounds for considering that the appellant's circumstances were so compelling as to justify, exceptionally, granting leave to remain outside the Immigration Rules on the basis of article 8 ECHR, such

that the decision of the Secretary of State was unjustifiably harsh. However, that point was not taken and the judge did give the appellant's circumstances consideration under the Razgar principles.

23. The principle factor in the proportionality balancing exercise was the judge's conclusion that until now the appellant has been perfectly happy going back and forth between Nigeria and the UK as a visitor. She has spent considerable time in Nigeria and very understandably, this point having been made several times in the determination, the judge concluded that requiring her to return there could not constitute a disproportionate decision. I do not consider that it required any more elaboration than that.

24. However, Mr Aborisade argued that the appellant's medical conditions mean that she cannot now continue dividing her time between Nigeria and the UK. Judge Cockrill noted a number of reasons why the appellant wanted to remain in the UK, one of which was to access the UK health services, which she has been exploiting during her time as a visitor. The appellant's health concerns are very well documented at several locations within the determination, including at §25, 26, 30, 32, 48, and 58. Other reasons include access and contact with family members, who are British citizens.

25. However, there is nothing within the medical evidence that was before the First-tier Tribunal to suggest that the appellant was unable to travel back to Nigeria, despite her ailments. Her symptoms are said to be under control with medication. The only reference in the grounds of appeal to the First-tier Tribunal state that she is a diabetic patient. Her desire to take advantage of the medical services here is insufficient grounds to grant leave to remain, as the judge noted at §57 of the determination.

26. It is not entirely clear how Mr Aborisade relies on the appellant's medical conditions. They certainly do not cross the high threshold of article 3 and whilst they are part and parcel of her present personal circumstances, there is nothing in the evidence before the First-tier Tribunal to suggest that the appellant could not continue the pattern she has developed over the years of maintaining the family life with relatives through occasional visits from Nigeria, with the family continuing their responsibility for her maintenance (see §30) and funding her medical treatment (see §58). Like Judge Cockrill, I cannot agree with Mr Aborisade's description of the appellant's circumstances as 'exceptional' in the sense that I do not find that the judge should have found on the evidence that they are so compelling as to justify, exceptionally, granting leave to remain outside the Immigration Rules or that would render the decision of the First-tier Tribunal unjustifiably harsh.

Conclusions:

27. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 3 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The decision of the First-tier Tribunal stands.

Signed: Date: 3 June 2014

Deputy Upper Tribunal Judge Pickup