IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16687/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 November 2014	**On 27 November 2014**

Before

THE HONOURABLE LORD BURNS
DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PROMISE TEMITOPE SOLEYE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Whitwell, Home Office Presenting Officer
For the Respondent: None (the respondent's father attended the hearing in person)

DECISION AND REASONS

1. This is an appeal that was allowed on Article 8 grounds in the First-tier. The appellant in the Upper Tribunal is therefore the Secretary of State. For the sake of clarity and convenience, however, we will refer to the parties as they were at the First-tier hearing.

2. The appellant, a citizen of Nigeria, was 14 years old when an application for her to return to the UK to live with her father and some of her siblings was refused by an Entry Clearance Officer. At the time of the decision the appellant was living with her mother and sister in Nigeria, but the appellant had earlier spent time in the UK with a Tier 1 dependant child visa. The appellant's mother had also been in the UK, but returned to study for a postgraduate degree in health and epidemiology in Nigeria, taking the appellant and another child with her. The appellant's father is now naturalised as a British citizen. The application was made with the intention that the appellant would return to the UK in advance of her mother and sister.

3. The appeal was allowed by First-tier Tribunal Judge Wellesley-Cole, in a determination promulgated on 1 September 2014. Permission to appeal was granted by Designated First-tier Tribunal Judge McClure, on 8 October 2014. The grounds seeking permission to appeal argue that the judge had failed to identify compelling or exceptional circumstances; that there had been inadequate reasoning in support of the conclusions on Article 8; and that there had been a lack of evidence concerning accommodation, which was an issue in the refusal.

4. At the hearing Mr Whitwell, for the Secretary of State, sought leave to add two further grounds. The first was that the judge should not have dealt with Article 8 at all, because it had not been raised in the grounds of appeal. The second was that maintenance and accommodation had not been conceded as an issue in the Entry Clearance Manager's review, and the judge had failed to make findings on material matters under the Immigration Rules, that were also relevant to Article 8. These matters consisted of accommodation; maintenance; and whether there were compelling family or other considerations making exclusion undesirable (paragraph 297(i)(f) of the Immigration Rules).

5. We gave leave for the grounds to be amended in this way, and did our best to explain the issues to the appellant's father. We also indicated, however, that in our view the jurisdictional point was not a strong one, because of the general duty of the judge to consider Article 8, and also because it appears likely that the representatives at the hearing addressed her on the subject.

6. At the hearing we did everything that we could to draw out from the appellant's father the reasons for the family's decision to apply for the appellant to return in advance of her mother and sister. We also tried to explain the significance of this decision within paragraph 297. The reasons put forward by the appellant's father were that the decision to opt for a phased relocation was partly to do with cash flow, taking into account the application fees; and there was also a concern about the appellant being unhappy, and restless, and this affecting her ability to concentrate on her studies. The appellant's father also mentioned her fear of kidnapping in Nigeria, because of the publicity about the group of girls kidnapped in the north. He also suggested that he had not expected there to be a problem, because she had been in the UK before, and the family would all be reunited in the UK in due course.

7. Mr Whitwell made the point that there had been no mention of the fear of kidnappings or disruption to education at the First-tier hearing. He also made the point that the kidnappings happened in the north, whereas the appellant is living in Lagos.

Error of Law

8. As we indicated at the hearing, we came to the view that the judge's determination allowing the appeal on Article 8 grounds did involve errors on points of law, and the decision therefore fell to be set aside.

9. The first difficulty, in our view, is that the judge did not complete the assessment of paragraph 297 before turning to consider Article 8. The determination appears to move from a consideration of paragraph 297(i)(f) to a consideration of Article 8 without a clear distinction, and without any finding as to whether there were in fact any serious and compelling family or other considerations making exclusion undesirable. This was an aspect of the second amended ground.

10. Within the Article 8 proportionality assessment itself there are a number of points of concern. In paragraph 12 the judge refers to part of Appendix FM, but it appeared to be agreed between the parties before her that the only Immigration Rule in issue was paragraph 297. There is a factual error about the appellant's age, at the start of paragraph 13. The judge refers to her as being 17, whereas in fact she was 14 at the date of decision. By the date of the hearing before us it was agreed that she was 15, but that she would turn 16 in December 2014. This was clearly a significant point in the judge's thinking, because she refers, in paragraph 16, to the appellant being "just under the age of 18", and refers to the reality of the situation being that the appellant would be left on her own in Nigeria with no close family. This appeared to be a concern that the appellant would not be able to make an application as a child, and would therefore somehow be stranded in Nigeria whilst the rest of her immediate family return to the UK. If the judge had proceeded on a correct understanding of the facts, namely that the appellant was 14, this would not have been a concern, because her 18th birthday was some years away.

11. In our view, therefore, the second of the original grounds of appeal put forward by the Secretary of State, as well as the second of the amended grounds, are made out. The Article 8 proportionality assessment has to be regarded as having been conducted within an incorrect legal framework, on the basis that a proper consideration of the Immigration Rules had not been completed, and on the basis that it was conducted on an incorrect understanding of the facts, in particular the central issue of the appellant's age, and the potential for her to be left alone, separated from the rest of her family.

12. For these reasons, without considering the other grounds, we have decided that the decision allowing the appeal on Article 8 grounds falls to be set aside, and that a remaking of the decision is required.

Remaking

13. As we indicated at the hearing, we took the view that the decision could be remade at once. We explained this to the appellant's father. We gave him a further opportunity to put forward any reasons for the appellant returning to the UK in advance of her mother and sister. The appellant's father added that he was concerned about the overall delay. He had now been engaged in trying to bring her to the UK for one year and seven months, bearing in mind the delays in the appeal. He indicated that he would shortly be making applications for his wife and the appellant's sister to return to the UK.

14. We have decided that, in remaking the decision, the appeal falls to be dismissed under the Immigration Rules, and under Article 8.

15. Under the Immigration Rules the central question was whether the test of serious and compelling family or other considerations making exclusion undesirable could be met. As we tried to explain to the appellant's father, the design of paragraph 297 is such that, in a situation where both parents are involved in a child's life, it is not easy to meet the requirements of the Rules in a situation where a child is living with one parent abroad, and that parent will not be travelling to the UK with the child. The issue here is not that of the child travelling unaccompanied. We accept that the appellant's father would have gone to collect her. The issue is that paragraph 297 is designed in such a way that the expectation will be that the child living abroad with one parent will stay with that parent until such time as that parent comes to the UK.

16. We gave the appellant's father every opportunity to explain what circumstances might be seen to amount to serious and compelling family or other considerations. We could see nothing in the appellant's father's answers that could be said to meet that test. We would accept that the appellant was keen to return to the UK ahead of her mother and sister. We would also accept that she may have certain fears, and that her state of mind may be impacting on her studies, but we note that these are all matters unsupported by documentary evidence, and it does not appear to us that they reach a level where it could be said that there is an arguable case, on these facts, to meet the serious and compelling family or other considerations test. In essence it appears that this was a matter of family choice, perhaps made without a full understanding of the nature of the Immigration Rules, but that there were no serious problems for the family in the appellant returning to the UK with her mother and sister, rather than coming ahead of them on her own. The disruption to education point was not detailed, and we note that the appellant's father had said, at the First-tier hearing, that he would arrange for her to continue her education in Nigeria if she was unable to come to the UK.

17. We note the other points raised, about maintenance and accommodation. It does not appear that the appellant's father will face difficulties in this regard in obtaining evidence for a future application, but even if satisfactory evidence could be provided

about the position at the date of decision, the appellant could not succeed under the Rules. This is because, if the appellant was unable to meet the test in 297(i)(f) at the date of decision, then the appeal would be bound to fail under the Immigration Rules, even if all other aspects were met.

18. In remaking the decision it is therefore our finding that the appellant did not meet the requirements of paragraph 297, in particular the serious and compelling family or other considerations test in paragraph 297(i)(f), at the date of decision. As a result the decision was in accordance with the law and the Immigration Rules, and the appeal falls to be dismissed on that basis.

19. Turning to Article 8 it appears to us that the Article 8 outcome follows in line with that under the Rules, for similar reasons. The Rules, through 297(i)(f), potentially cover circumstances in which there would be some compelling need for the appellant to return alone, and there are no separate matters that would become relevant only under Article 8 outside the Rules. We note, first, that the appellant was living with her mother and younger sister at the date of decision, and that she was in education. It was necessary for the decision maker to observe the need to respect the appellant's right to private and family life, and to take into account her best interests as a child. If there had been some prospect of her being left alone in Nigeria, separated from the rest of her family, then that would have raised a serious issue. As we have already said, however, in our view this decision, taken in July 2013, could not have produced circumstances of this sort. The appellant's mother and sister had not yet applied to return to the UK. It is significant in this respect that these applications had still not been made by the date of the hearing before us.

20. The consequences of the decision therefore amounted to the appellant being required to stay in Nigeria with her mother and sister, until her mother applied to return. The facts as presented to the Entry Clearance Officer suggested that it was the intention of the appellant's mother to return to the UK within a relatively short period. This has turned out to be somewhat longer than was suggested, but the appellant's age was such that the family had plenty of time to make further applications for the appellant to return to the UK with her mother. If the appellant's parents had been properly advised from the start it may well have been that they would have chosen to ensure that whichever children returned to Nigeria with their mother would not be disadvantaged in any way by remaining with their mother in Nigeria until the date of her return.

21. We understand the appellant's father's frustration, in that it was clear that he thought that the fact that his daughter had been in the UK before meant that there should be no problem with her returning on her own, but once it is clear, because of the way that the Immigration Rules are designed, that those Rules cannot be met, the engagement of Article 8 would have to relate to issues of much greater seriousness than what effectively amounts to a matter of choice for the family as to the timing of the return of one of their children.

22. We would accept that the appellant enjoys family life with both of her parents, and with her siblings. The family have chosen to arrange matters in such a way that she returned to Nigeria with her mother. At the date of decision she was therefore living with one parent and one of her siblings. The same reasoning that we have applied to the issue of serious or compelling family considerations also applies, in the same way, to the issue of whether the decision amounted to an Article 8 breach, through being a disproportionate interference with the right to respect for family and private life. Even if we were to take the view that the issues involved amounted to an interference of sufficient seriousness to engage Article 8, which appears to us to be doubtful, none of the potential issues put forward in support of the family's wish for her to return in advance of her mother appear to us to come close to showing that any interference would be disproportionate.

23. Looking at the date of decision it is therefore our finding that the Entry Clearance Officer's refusal did not breach Article 8, and the appeal, in being remade, therefore falls to be dismissed on that basis.

24. It was not suggested before us that there was any need for anonymity in this appeal. Despite the appellant's age it does not appear to us that any of the matters raised require anonymity. We also note that no anonymity direction was made at the First-tier hearing. We note that the First-tier Judge made a full fee award. Since the appeal falls to be dismissed, on remaking, it follows that there can now be no fee award. As we explained to the appellant's father at the hearing nothing now prevents applications being made for the appellant, her sister and her mother to return together. If the appellant's mother will be returning with her Paragraph 297(i)(c) will apply, and there will be no need to meet the test in 297(i)(f).

Notice of Decision

25. The Secretary of State's appeal is allowed.

26. The decision of the First-tier Judge allowing the appeal on Article 8 grounds is set aside. The decision is remade as follows.

27. The appeal is dismissed under the Immigration Rules.

28. The appeal is dismissed on human rights grounds.

29. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Gibb

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Gibb