IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10424/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2015	**On 27 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS MARIAM OMOYEMI QUADRI
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:
For the Appellant/Secretary of State: Ms S Vidyadharan, Specialist Appeals Team
For the Respondent/Claimant: Mrs J Heybroek, Solicitor, Cale Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal the decision of the First-tier Tribunal allowing the claimant's appeal against the decision by the Secretary of State to refuse to grant her leave to remain on the grounds of long residence. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The claimant is a national of Nigeria, whose date of birth is 12 December 1964. On 5 July 2012 she applied, with the assistance of Cale Solicitors, for ILR on long residence grounds. She claimed to have arrived in the UK from Nigeria on 30 November 1995, having left behind her former husband and three children. Her case was she could no longer bear the tumultuous violence that she was subjected to on a daily basis at the hands of her violent husband. Her travel to the United Kingdom had been facilitated by an agent, with the support of family and friends in the UK. Upon arrival in the UK, she had lived with her aunt Mrs Abiola Ogunkoy, a British national at an address in London, SE13 up until 2003. She had then gone to stay with another family member at an address in London, SE17, before finally settling down at her present address. She was in a stable and subsisting relationship with Mr Tunde Ayoyemi, who was present and settled in the UK. The claimant's solicitors asserted that the claimant qualified for leave to remain under paragraph 276B of the Rules; and in the alternative her removal would contravene Articles 2, 3 and 8 of the ECHR. Their client's life would be in grave danger from her husband if she went back to the south western part of Nigeria from where she originated. Relocation to another part of Nigeria would be difficult, and if she went to the north of Nigeria, it would not be safe.

3. While the application was pending, the claimant was convicted at Woolwich Crown Court on 12 June 2013 of obtaining pecuniary advantage by deception on 23 May 2005 in contravention of Section 16(1) of the Theft Act 1968. She was sentenced to a term of imprisonment of eighteen weeks.

4. On 14 January 2014 the Secretary of State gave her reasons for refusing the claimant's application for ILR, and for making directions for her removal as an illegal entrant.

5. The documentary evidence did not substantiate a claim to reside in the UK continuously for fourteen years. The evidence provided was sparse, and did not cover the entire fourteen year period. She had provided no documentary evidence at all for the period 1996 to 1999 and from the year 2000 to 2001. Furthermore, evidence of residence was required in the form of documents from official verifiable sources such as utility companies, employers' letters, dental/general practitioners, bank statements and Government departments. She had not provided such material which would substantiate her claim to reside in the United Kingdom since allegedly arriving here in November 1995. She did not in any event meet the requirements of paragraph 276B(iii) of the Rules as she had an unspent conviction. Her conviction on 12 June 2013 would not be considered spent until 12 June 2020.

6. She also fell foul of paragraph 322(1C)(iii) which provided that an application for leave to remain or variation of leave to enter or remain in the United Kingdom should normally be refused where, inter alia, the applicant had been convicted of an offence for which they have been sentenced to a term of imprisonment of less than twelve months, unless a period of seven years had passed since the end of the sentence.

7. The SSHD went on to consider whether the claimant had a viable family or private life claim under Appendix FM or Rule 276ADE of the Rules. She did not, inter alia, satisfy the requirement of having lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but having no ties to the country to which she would have to go if required to leave the UK. She also fell foul of paragraph S-LTR1.6 as her presence in the UK was not conducive to the public good because her recent criminal conviction made it undesirable to allow her to remain in the UK.

8. She stated her life would be in danger if returned to Nigeria as she would suffer abuse from her husband. If she had a genuine fear of this, it was open to her to make an asylum claim. Regard had been given to all the representations that she had submitted, but there were no sufficient compelling or compassionate circumstances to justify allowing her to remain in the United Kingdom outside the Rules.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. The claimant's appeal came before Judge Majid sitting in the First-tier Tribunal on 24 September 2014. The claimant was represented by Mrs Heybroek, and the Secretary of State was represented by Mr Carroll. The judge received oral evidence from the claimant and her aunt Mrs Ogunkoy.

10. In his subsequent determination, the judge made some findings of fact in favour of the claimant at paragraph 10. At paragraph 15 he observed that the author of the refusal letter seemed not to realise that the claimant's case should be considered under the old Rules which were without doubt more lenient than the present Rules. At paragraph 16, he cited an extensive extract from the claimant's witness statement of 23 April 2014. At paragraph 17, he said he was clearly persuaded that this was a case in which the rule of law required that the appeal should be allowed. He was particularly affected by the dispositive reasons (findings of fact) he had enumerated in paragraph 10 of his determination. Compassion made a positive judgment acceptable given the fact that the claimant was forced to leave Nigeria in 1995 due to the violence of her husband.

11. At paragraphs 18 to 21, the judge made reference to various authorities, and to the Immigration Act 2014. He described the 2014 Act as trying to obviate the benefit of the ECHR Articles, particularly relating to the respect for family life. He said that judges believed that in giving the protection of the HRA parliament did not intend to supersede the HRA by ordinary changes to the Rules, clearly understood to be far less in statutory status. His careful reading of the 2014 Act revealed that the **Izuazu** type situation could still lead to Article 8 ECHR being applied in appropriate circumstances. In this particular case, he found that the claimant could not be deprived of the protection of the Convention and should be helped to remain with her family members in the UK. His partner was sitting in court, willing to be examined on his witness statement. His Counsel had submitted that his seven year old relationship, and his keenness to marry the claimant as soon as her immigration was sorted out, should be taken into account.

12. The judge concluded at paragraph 23 that he was persuaded that the claimant merited the benefit of the Immigration Rules HC 395, as amended, and the protections of the ECHR. The judge allowed the appeal, not specifying on what basis the appeal was allowed.

The Application for Permission to Appeal

13. The Secretary of State applied for permission to appeal, arguing the judge had failed to give reasons, or adequate reasons, for findings on material matters. The claimant's credibility was seriously undermined, as she had failed to disclose her conviction for deception in 2013. If she had disclosed this information, her refusal would have been mandatory under the old Immigration Rules. The judge had also failed to provide adequate reasons why her circumstances were either compelling or exceptional.

The Grant of Permission to Appeal

14. On 24 November 2014 First-tier Tribunal Judge P G J White granted permission to appeal for the following reasons:

    (a) the judge appears to have allowed the appeal under the Immigration Rules and the ECHR;

    (b) it is arguable the judge has given insufficient reasons as to why any of the Immigration Rules are met;

    (c) the judge's approach to human rights is arguably difficult to discern;

    (d) it is arguable the judge has failed to have any engagement with the fact that the claimant was convicted of a criminal offence and sentenced to a term of imprisonment in 2013;

    (e) the judge arguably appears to show no adequate engagement with part 5A of the 2002 Act (public interest).

The Hearing in the Upper Tribunal

15. At the hearing before me, Mrs Heybroek drew my attention to her written Rule 24 response. She accepted that the judge had erred in law insofar as he had allowed the appeal under the Rules, but she submitted that his finding under Article 8 was sustainable. Although she had not relied on the Court of Appeal decision in **Edgehill**, she submitted that it was open to the judge to conduct an old style Article 8 assessment without reference to Appendix FM or Rule 276ADE because the application predated the introduction of the new Rules. Moreover, in the light of the positive findings of fact made by the judge, his finding that the claimant succeeded in an Article 8 appeal outside the Rules was sustainable. She acknowledged that he had not set out the five point **Razgar** test, and nowhere in his decision did he refer to proportionality. But he was an experienced judge who had referred to the relevant case law. So it should be taken that he knew what he was doing, and had adopted the correct approach.

16. Having heard submissions from both parties on the error of law question, I found that the decision of the First-tier Tribunal was vitiated by a material error of law such that it should be set aside in its entirety. I gave my reasons for so finding in short form and my extended reasons are set out below. I then received submissions on future disposal. Mrs Heybroek was keen that the judge's favourable findings of fact should be preserved, whereas Ms Vidyadharan submitted that none of the judge's findings of fact could stand. As I needed to reflect on this, I reserved my decision on this question.

Reasons for Finding an Error of Law

17. As conceded by Mrs Heybroek, the judge erred in law in finding that the claimant qualified for ILR under the Rules. Her criminal conviction debarred her from succeeding under the fourteen year long residence Rule which was in force at the time of her application. Although the judge failed to make findings of fact on the applicable provisions of Appendix FM and Rule 276ADE, it is apparent from the uncontested fact of the claimant's conviction and the contents of the claimant's witness statement that she did not qualify for leave to remain on either family or private life grounds under the new Rules. Her mother remained in Nigeria (see paragraph 18 of her witness statement) and in his witness statement her partner said he had recently visited her children in Nigeria, and had provided them with financial support. Although Mr Ayoyemi is described in the decision as the claimant's partner, he was not in fact a partner for the purposes of Appendix FM. This is because they had not been living together in a relationship akin to marriage.

18. Following **Nagre** and **MF Nigeria** in the Court of Appeal, it was necessary for Judge Majid to undertake a two stage Article 8 assessment. This he manifestly failed to do. His failure cannot retrospectively be defended on the basis that it is in accordance with the Court of Appeal decision in **Edgehill**.

19. Under the transitional provisions contained in HC 194, it was expressly represented that an application for leave to remain that was pending as of 9 July 2012 would be considered in accordance with the Rules in force on 8 July 2012; and, as held by the Court of Appeal in **Edgehill & Anor [2014] EWCA Civ 402**, that the Secretary of State would not rely on the new Rules which came into force on 9 July 2012. The *ratio* of **Edgehill** is that the Secretary of State cannot go back on this express representation, and so cannot rely on the new twenty year rule when addressing an Article 8 claim by an applicant who applied on long residence grounds *before* 9 July 2012.

20. However, the Court of Appeal's attention was not apparently drawn to a modification of the transitional provisions in HC 194 which was introduced into the Rules in September 2012 by HC 565 (06.09.12). Rule A277C, in its initial form, provided as follows:

> Subject to paragraphs A277 to A280 ... where the Secretary of State is considering any application to which the provisions of Appendix FM (family life) and paragraphs 276ADE to 276ADH (private life) do not already apply, she will do so in line with these provisions.

21. As from 13 December 2012, paragraph A277C was re-worded as follows:

> Subject to paragraphs A277 to A280 ... where the Secretary of State deems it appropriate, the Secretary of State will consider any application to which the provisions of Appendix FM (family life) and paragraphs 276ADE to 276ADH (private life) do not already apply, under ... EX.1 of Appendix FM (family life) and paragraph 276ADE (private life) of these Rules. If the applicant meets the requirements of leave under those provisions (except the requirement for a valid application), the applicant will be granted leave under ... Appendix FM or under paragraph 276BE of these Rules.

22. Accordingly, prima facie the Rules permitted the Secretary of State at the date of decision in January 2014 to consider this appellant's Article 8 claim under Rule 276ADE, although the Rule did not "already" apply to her as the application of the Rule was previously excluded by the transitional provisions of HC 194.

23. The ratio of **Edgehill** is also called into question by the Court of Appeal decision in **Haleemuden [2014] EWA Civ 558**.

24. But even if the ratio of **Edgehill** is treated as sound, Judge Majid was not relieved of the obligation to undertake a two stage assessment. At best the impact of **Edgehill** on the claimant is that it cannot be held against her that she has not yet accrued twenty years' unlawful residence.

25. The decision of Judge Majid on the Article 8 claim failed to perform an essential function which is to explain to the losing party why she had lost. Most egregiously, the decision wholly failed to engage with the public interest considerations arising under Section 117B of the 2002 Act as amended by the Immigration Act 2014.

26. Accordingly, as I ruled at the hearing, the entire decision is vitiated by a material error of law, such that it should be set aside and remade.

Future Disposal

27. The findings of fact which Mrs Heybroek submits should be preserved are the following:

    (a) that the claimant has been in the UK since 1995; and

    (b) that she was forced to leave Nigeria in 1995 as she was a victim of domestic violence; and

    (c) on return to Nigeria she is likely to be killed by her husband who caused her to leave Nigeria in the first place.

28. Mrs Heybroek's reasoning was that Judge Majid, who is an experienced judge, had the benefit of receiving oral evidence from the claimant on these matters, and it was reasonably open to Judge Majid to find her to be an entirely credible witness.

29. However, his decision contains no recognition of the fact that the claimant had recently been convicted of an offence of dishonesty, albeit that the actual offence took place in 2005. Judge Majid has not apparently taken into account in assessing the claimant's credibility her conviction for an offence of dishonesty. Furthermore, the reasoning underpinning the favourable findings of fact is very thin, and it does not adequately engage with the case for the Secretary of State.

30. Accordingly, I find that none of the findings of fact made by Judge Majid should be preserved.

Conclusion

31. The decision of the First-tier Tribunal contains an error of law such that the decision should be set aside in its entirety and remade.

Directions

32. This appeal shall be remitted to the First-tier Tribunal at Taylor House for a de novo hearing on the claimant's Article 8 claim before any judge apart from Judge Majid. None of the findings of fact made by the previous First-tier Tribunal shall be preserved.

Signed Date **27 January 2015**

Deputy Upper Tribunal Judge Monson