IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10674/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th May 2015	**On 15th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

DAVID OPEYEME ALAWADE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Nnamani (Counsel)
For the Respondent: Mr S Kandola (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Youngerwood, promulgated on 3rd October 2014, following a hearing at Taylor House on 16th September 2014. In the determination, the judge dismissed the appeal of David Opeyemi Alawade. The Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Nigeria, who was born on 7th September 1993. He entered the UK on a visit visa on 4th November 2004. His leave expired on 19th February 2005. The Appellant subsequently overstayed. On 20th May 2013, he applied for indefinite leave to remain. On 12th February 2014, the Secretary of State refused that application and also made a decision to remove the Appellant to Nigeria. The Appellant appeals against that decision.

The Appellant's Claim

3. The Appellant's claim is that he arrived in the UK, with his younger brother on 4th November 2004, sponsored by his paternal uncle and his wife, and that the reason for this was his parents were undergoing enormous financial difficulties in the respect of their upbringing. Since their arrival, the Appellant's younger brother has been given indefinite leave to remain. The Appellant has lived continually with his paternal uncle and his wife since coming to the UK. He is currently studying for a B.Eng (Hons) in Engineering at the University of Bolton.

The Judge's Findings

4. The judge held that the Appellant had been in the UK unlawfully since February 2005, "and the key person responsible, his uncle, was fully aware of that fact" (paragraph 16). Consideration was given to the case of **Ogundimu [2013] UKUT 60** which considered the meaning of the word "ties" and explained that it is "a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal" (see paragraph 17). The judge observed that the Appellant had left his country of origin at the age of 6 and had been in the UK for 23 years.

5. However, the judge held that the Appellant had "some contact between himself and his parents, and more particularly between his uncle, whom he treats as his father, and his parents. There are, in addition, other family members in Nigeria, ..." The judge went on to hold that

> "The arrangement whereby the Appellant came to, and stayed in the UK is clearly basically a financial one, rather than based on any hostility towards him from his parents. The Appellant still has, on my findings, social and cultural ties to Nigeria, not diminished by his ties to his uncle, and has not lost all family ties there" (paragraph 18).

6. It was on the basis of these facts, that the judge then went on to consider the law. Specific consideration was given to the well-known case of **Kugathas [2003] EWCA Civ 31**. In this respect, the judge observed that, whereas **Kugathas** might have been interpreted too strictly in the past, nevertheless, "a key principle must still be the extent of emotional dependence between members of a family" (paragraph 19). The Appellant's private life was clearly met "given the length of residence that

the Appellant has been here" (paragraph 19). On this basis, the judge had regard to the "**Razgar** principles." However, given that Section 117B of the 2014 Immigration Act had to be applied, it was clear that "little weight" had to be given to a private life that was established at a time when the Appellant's presence in the UK was precarious (see paragraph 19).

7. The judge went on to conclude that, "the key reason for the overstaying, if not the Appellant's original entry to the UK, was because of the financial problems of his parents ..." (paragraph 20). After the Appellant's arrival in the UK, two further children were born to his parents, "and his younger brother came to the UK notwithstanding those financial difficulties." In terms of the impact of the decision on the Appellant, the judge observed that, "whilst the Appellant's education would clearly be seriously interrupted, he knew full well at the time he entered that education that his status in the UK was precarious" (paragraph 20).

8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that the judge failed to give proper consideration to paragraph 276ADE because the Appellant has no family ties to Nigeria and has not spoken to his biological parents for some years. The judge also misdirected himself in relation to Article 8 because young adults who have not formed an independent family unit, and are still financially dependent, will be considered to enjoy family life.

10. The judge also failed to take into account the significance of the fact that the Appellant arrived in the UK as a minor and even if he became aware of that fact, he was only 14 or 15 years old at that time, and was still a minor. Arrival or residence in the UK as a minor is a weighty consideration in the balancing exercise. The Appellant could not be responsible for his unlawful presence in the UK. Moreover, his brother who was two years younger, had been granted discretionary leave to remain in the UK.

11. On 30th March 2015, permission to appeal was granted on the basis that the judge failed to have regard to the principles set out in **AA v UK** and **Ghising**.

12. On 21st April 2015, a Rule 24 response was entered to the effect that the judge was entitled to make the findings that he did. The Appellant was in the UK unlawfully and continued to remain here in the knowledge that his immigration status was precarious.

Submissions

13. At the hearing before me on 28th May 2015, Ms Nnamani made three specific submissions. First, in relation to paragraph 276ADE, the judge erred in law in concluding at paragraph 18, that the Appellant had social and cultural ties to Nigeria because, although the judge refers to the case

of **Ogundimu [2013] UKUT 60**, the significance of that case was misunderstood because it referred to the fact that "ties" are such that they "involve there being continued connection to life in that country; something that ties a Claimant to his or her country of origin", and in this case, the Appellant had not been to Nigeria since coming to the UK and had next to no contact with his parents there.

14. Second, as far as Article 8 was concerned the judge did find that the Appellant was living with the uncle and the uncle's wife and was financially dependent upon them. However, he referred to **Kugathas** and did not refer to the later decision of **Ghising** which refines the test in that case.

15. Third, as far as proportionality was concerned, whilst it was accepted that the judge had to have regard to paragraph 117B of the 2014 Act, he was wrong to conclude that "little weight" should be attached to the Appellant's precarious immigration status in the UK because the Appellant had come to the UK at the time when he was a minor and had no particular say in his living in the UK.

16. For his part, Mr Kandola submitted that paragraph 276ADE was properly applied. This is because the judge specifically had regard to the case of **Ogundimu** (at paragraph 17) and then proceeded to apply the law to the facts as he had found, such that it was his clear conclusion that he still had social and cultural ties to Nigeria, and these were not diminished by his ties to his uncle (see paragraph 18). The judge was entitled to come to this conclusion.

17. Second, the case of **Kugathas** was the right case to apply here because the case with **Ghising** involved an actual son who had during adulthood developed ties with his parents, whereas in this case we are talking about a nephew who remained throughout a family member of his parents living in Nigeria, rather than the family member of his uncle or aunt.

18. Third, even if the younger brother had been granted discretionary leave to remain, the decision, on the facts of this particular case, was entirely proportionate in relation to the Appellant's case.

19. In reply, Ms Nnamani submitted that the Appellant had not been in touch with his parents for more than two years. He was living at home even though he had been a student at the University of Bolton and this matter was not rejected by the judge. My attention was drawn to the Appellant's skeleton argument at paragraph 7 (page 4).

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision and re-make the decision (see Section 12(2) of **TCEA [2007]**). My reasons are as follows.

21. First, the judge has misinterpreted the decision in **Ogundimu [2013] UKUT 60**. The facts of the instant case are that the Appellant has been in the UK for 22 years. There is no evidence that he has returned back to Nigeria. The Tribunal in **Ogundimu** described the word "ties" as importing "a concept involving more than merely remote and abstract links to the country of proposed ... removal." In the instant case, the judge has found there to be the existence of social and cultural ties to Nigeria simply on the basis that, "the arrangement whereby the Appellant came to, and stayed in, in the UK is clearly basically a financial one, rather than based on any hostility towards him from his parents" (see paragraph 18). This does not show that the Appellant has something more than merely remote and abstract links to a country that he has not visited or had any dealings with for the last 23 years.

22. Second, the judge erred in not looking at the latest case law following the decision in **Kugathas [2003] EWCA Civ 31**. Although Ms Nnamani did not properly explain the implications of **Ghising** in her submissions before this Tribunal that case bears further consideration. The Tribunal there held that, "we accepted the Appellant's submissions that the judgments in **Kugathas** had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts" (see paragraph 56). The uncontested evidence here is that the Appellant has not formed a family unit of his own. He is not in a family unit with his parents in Nigeria either because he has been living in the UK for the last 22 years. He has no significant partner with whom he has or he intends to settle down in the foreseeable future.

23. But even so, **Kugathas** does state in relation to ties between family members other than a parent and a son that, "whether it extends to other relationships depends on the circumstances of the particular case" and that "evidence of further elements of dependency, involving more than the normal emotional ties" (at paragraph 14) would be a relevant consideration. In the instant case, the evidence before the judge was that, "he lived with his adoptive parents, together with his own younger brother, and his uncle's sister" (paragraph 8). The reference to "his adoptive parents" was a reference to his uncle and aunt. The judge erred in concluding that on this basis the Appellant was not enjoying a family life with his uncle and aunt.

24. Third, whilst the judge did reject all of the above, he did accept that, "private life is clearly met, given the length of residence that the Appellant has been here ..." (paragraph 19). He then rejected the claim on this basis given Section 117B of the 2014 Act. However, what Section 117B states is that "little weight is to be given," which does not mean that no weight is to be given whatsoever. In this case the Appellant had been in this country for 22 years.

Re-Making the Decision

25. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.

26. First, that the Appellant has no more than merely remote and abstract links to Nigeria, for the reasons that I have given above, given that he has been in the UK for 22 years.

27. Second, that given the jurisprudence in **Ghising** and the other ECHR cases, the Appellant has become a member of the family unit of his uncle and aunt, who are his adoptive parents, and this evidence was not rejected by the judge.

28. Finally, as far as family life is concerned itself Section 117B has no application to this because it is confined to private life rights only. I come to these conclusions notwithstanding my misgivings about the manner in which, as the judge has very rightly pointed out, the Appellant and his younger brother have been brought to the UK, even if this was on account of the financial problems of his parents, and left here with his uncle and aunt. As the judge rightly pointed out, "the Appellant has been here unlawfully since February 2005 and the key person responsible, his uncle, was fully aware of that fact" (paragraph 16). However, the Appellant has nevertheless been in the UK for 22 years, and given the considerations that I have set out above, the balance of considerations then fall in his favour, such that this appeal must be allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 12th June 2015