



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/12439/2014

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2015

Decision & Reasons Promulgated
On 23 June 2015

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FIKAYO FRANCISCA BALOGUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant/Secretary of State: Mr S Kandola, Home Office Presenting Officer

For the Respondent/Claimant: Mr A Chohan, Counsel instructed by Greenfields Solicitors

DECISION AND REASONS

1. The claimant whom I shall refer to as the appellant as she was before the First-tier Tribunal is a citizen of Nigeria and her date of birth is 17 May 1985.

2. On 23 January 2014 the appellant made an application to vary her leave. On 24 January 2012 she was granted leave to remain as a Tier 1 (Post-Study) Migrant. This leave expired on 24 January 2014. Her application was considered by the Secretary of State under paragraph 276ADE of the Immigration Rules. It was the view of the Secretary of State that the appellant could not meet the requirement of 276ADE(vi) of the Rules because it was not accepted that she had no ties with Nigeria.
3. The Secretary of State concluded that there were no exceptional circumstances preventing the appellant continuing family and private life outside the UK. The date of the Secretary of State's decision is 21 February 2014.
4. The appellant appealed against the decision of the Secretary of State and her appeal was allowed by Judge of the First-tier Tribunal Judge Upper Tribunal Judge Joshi in a decision that was promulgated on 16 March 2015. Judge Joshi allowed the appeal under Article 8. Permission to appeal against that decision was granted to the Secretary of State by Judge of the First-tier Tribunal Page on 5 May 2015.

The Decision of the First-tier Tribunal

5. The appellant's case rested on her claim to private life here in the UK. She has a Masters degree here and has held various positions of employment here. At the date of the hearing she was employed, on a full-time basis, by Transport for London as customer services assistant and she was earning £29,140 per annum. Her evidence was that she supports her family. Her parents are in Nigeria and her father is in poor health. She has two brothers, one in the United States and the other in Cyprus. Both are studying and she supports them. Her life in the UK revolves around writing poetry, employment and the church. Some of her poems have been published in a magazine and on various websites and she attends creative writing and poetry workshops and performances here. Her evidence before the First-tier Tribunal was that in Nigeria the internet is expensive and she would not have work, accommodation or money. She would struggle to continue to write there. The judge found the appellant to be credible and accepted her evidence.
6. The judge made the following findings:
 - "23. In relation to Article 8 and exceptional circumstances, I have considered the decision in Regina v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27, in particular, the 5 step approach to dealing with Article 8 cases. Firstly, I am satisfied that the proposed removal will be an interference by a public authority with the exercise of the appellant's right to respect for private life. The appellant's private life consists of her voluntary work, poetry, writing, employment, friends, family, Church and childcare.
 24. Secondly, I have considered whether such interference will have consequences of such gravity as potentially to engage Article 8. I am persuaded that the consequences for the appellant and her family if she is

removed from the United Kingdom will be grave. Her brothers are unlikely to be able to continue with their education and she is unlikely to be able to pursue her writing and poetry activities in Nigeria to the extent that she can do so in the United Kingdom. The appellant's parents are likely to be financially dependent on her and will face difficulties to pay for their medical and living expenses if she is forced to give up her employment with Transport for London.

25. I have also considered whether the appellant's removal would be in accordance with the law, whether the removal is necessary in the interests of national security, public safety, economic well-being of the country, prevention of crime, protection of health/morals or rights and freedoms of others. I have also taken into account whether the removal is proportionate to the legitimate public aim to operate a fair and coherent system of immigration control. I am satisfied that the appellant does not pose a risk to national security or public safety, she has been law-abiding since her arrival in the United Kingdom. She is benefitting the economic well-being of the country by working and paying her taxes. Section 19 of the Immigration Act 2014 introduced into the Nationality, Immigration and Asylum Act 2002, Part 5A containing sections 117A-117D. I have considered sections 117A-117D as set out in statutory guidelines. I have considered sections 117A-117D and conclude that the appellant speaks English; has not committed any crimes and has been self-sufficient since her arrival in the United Kingdom. She has undertaken several educational courses and has been employed in numerous jobs since she was given leave to work. She has provided evidence of her active involvement and commitment to public service by volunteering for charities, volunteering for children's groups, attending her local Church and local community groups. I am satisfied that she would not be able to freely undertake the activities that she currently undertakes and her brothers and parents will suffer financially and emotionally if she were to be removed from the United Kingdom. Her job prospects and life ambitions will be gravely restricted. I am satisfied that her removal would not be proportionate after balancing the need to operate a fair and coherent system of immigration control as against an individual's right to respect for private life.
26. The appellant gave credible evidence at the hearing. I am satisfied that the appellant's passion for poetry and ambition to become a published author and poet is one of her main goals. She demonstrated that she is a young woman whose life revolves around her creative writing, poetry and performance. She is passionate about her art and has future ambitions to progress and further her interest. She appears to be a gifted poet having had some of her work published and she regularly undertakes and organises spoken word performances. She has established a website with a blog on which she regularly uploads her articles and poetry and she connects with and supports other writers. The appellant stipulates in her

witness statement that her creative writing and poetry is her life and that if she is made to return to Nigeria this part of her life would end. I am satisfied that this is her main passion in life and that an interference with her right to enjoy her artistic freedom could, taken with other factors, amount to a breach of her right to respect for private life.

27. I accept Mr Shane's helpful submissions that Nigeria has a functioning economy and that she is likely to be able to access the internet in Nigeria and should be able to update her website and write her blogs, although she may experience some difficulties relating to electricity supplies and connections. I do not accept, however, that she will be able to perform, network, and attend workshops to anyway near the extent that she is currently able to in the United Kingdom.
28. I accept the respondent's reasoning in so far as the standard of living will not be the same for the appellant in Nigeria, however, I find that there are good reasons to add weight to her claim for leave on human rights, compassionate and discretionary grounds, after taking into account her life being defined by her passion and ambition for writing, childcare, financial contribution to the economy and her family. I have taken into account the decision in UE (Nigeria) and others v Secretary of State for the Home Department [2010] EWCA Civ 975 and LU 30.10.2010 in which the Court of Appeal held that the issue of community value can be one factor, but not necessarily the main factor, when assessing proportionality. The public interest in retaining in the United Kingdom someone who is of value to the community could be relevant to the exercise of immigration control. I accept that this factor in isolation would not be sufficient to shift the balance in favour of the appellant but it is a relevant consideration. The appellant's voluntary work and contributions to the Church, children's nurseries and creative writing blogs has benefitted the community and it is a relevant factor when considering the legitimate aim of immigration control and the private life claim of the appellant. I find that the loss of a positive contribution to the community affects the issue of public interest in the proportionality test under Article 8.
29. I have borne in mind the decisions in the cases of Nasim and others (Article 8) [2014] UKUT 25 (IAC) where the judgments of the Supreme Court in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 were considered. However, the facts of the appellant's case can be differentiated because of the contribution she makes to her community, to her family and to the economy. I have considered the financial contribution she makes to the United Kingdom economy and the financial contribution she makes to her family. The appellant provided plausible evidence of her attempts to secure employment in Nigeria. At the hearing, the appellant confirmed that the only employment she was able to secure was either voluntary work through contacts or one job that offered to pay her 50,000 Naira [equivalent of £160 per month]. Her

current salary from her employment with Transport for London is significantly more, in the region of £2,400 per month. I am satisfied that her job prospects in Nigeria would be limited and her earning capacity would be minimal compared to the salary that she is earning in the United Kingdom. She stated that she is unlikely to maintain the financial support that she provides for her family should she be required to leave the United Kingdom.

30. The appellant's brothers have immigration restrictions on working. The appellant is therefore financially contributing to the cost of her brother's university fees. I accept, on a balance of probabilities, that it is highly likely that they will not be able to afford their university fees should the appellant be required to leave the United Kingdom and hence lose her job with Transport of London. A further factor is the support she provides to her parents and in particular, her father who is in ill-health. Her evidence at the hearing was credible and I am satisfied that she also supports her parents. The appellant described at the hearing that her parents are now living in a room at her grandparent's house. Her uncle and his family also live there. This was consistent with the letter provided by her mother confirming the evidence that she gave at the hearing. The appellant also stated that if she is returned to Nigeria she will not have a home, work or money to support herself. I have considered the decision of the House of Lords in Beoku-Betts v SSHD [2008] UKHL 39. In this case the court considered whether or not a Tribunal should consider the family life of all the relevant family members, when considering an appeal that raised Article 8, or whether the Tribunal should only consider the family life of the individual who had brought the appeal. The House of Lords decided that the family life of all the relevant family members should be considered. I have borne this in mind when assessing the proportionality of removing the appellant from the United Kingdom."

Grounds of Appeal and Oral Submissions

7. The grounds of appeal are threefold. The first ground is that the judge failed to properly consider Article 8 in the context of Section 117B of the 2002 Act. The second ground is that the judge wrongly applied the case of Beoku-Betts v SSHD [2008] UKHL 39 and the third ground is that the judge failed to give adequate reasons why the appellant would be unable to pursue her goal of becoming a published author should she return to Nigeria.
8. I heard oral submissions from both parties. Mr Kandola made oral submissions in the context of the grounds of appeal. Mr Chohan submitted that there was no error of law in the decision of the judge who found the appellant to be credible. She had always had leave here in the UK and had always been here legally. The judge accepted that the appellant was a gifted and talented writer and this amounts to exceptional circumstances. In addition the dependency of her brothers on the appellant amounted to exceptional circumstances. Her situation was unique and it

was open to the judge to find compelling circumstances and allow the appeal under Article 8.

Error of Law

9. I am satisfied that the judge did not have regard to the relevant parts of Section 117B of the 2002 Act. The judge did not properly direct himself to the effect that the maintenance of effective immigration control is in the public interest according to Section 117B (1). I am not satisfied that the judge had proper regard to Section 117B (5) which states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. She has been in the UK since 2010. Initially she came here as a Tier 4 (General) Migrant and she subsequently obtained further leave as a Tier 1 (Post-Study Work) Migrant which expired on 23 January 2014. Having had regard to the recent decision of AM (S 117B) Malawi [2015] UKUT 0260, it is clear that on the facts of this case the appellant's immigration status though not unlawful is precarious.
10. The judge impermissibly extended the judgment in Beoku-Betts v SSHD to benefit the appellant in this case. The appellant's brothers, as found by the judge, dependent on her; however, they do not form part of her family life in the UK. There will be no disruption to their family life in the UK should the appellant be removed. The judge did not find that she would have no prospects as a writer in Nigeria but that it such a career would be more difficult to pursue.
11. For the above reasons I find that the judge materially erred and I set aside the decision to allow the appeal under Article 8(2) pursuant to Section 12(2) (a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). Both parties agreed that should the decision be set aside I could go on and remake it and that there was no need for a re-hearing. There was no further evidence submitted. The judge found that the appellant is a credible witness and accepted her account and there was no reason for me to go behind those findings as they were not challenged by the Secretary of State and are lawful and sustainable.
12. The appellant's claim rests solely on her private life here in the UK. Although there is no general proposition that leave to remain should only be granted in exceptional cases, this is an appeal that relies solely on private life which has been established in the United Kingdom at a time when the presence of the appellant was precarious and where there are no children involved. There is no challenge to the decision of the Secretary of State that the appellant is not able to meet the requirements of the Immigration Rules and the Tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (see Haleemudeen v SSHD [2014] EWCA Civ 551. The appellant's interests at stake are not in this case of such a pressing nature that leave should be granted outside the rules.
13. The appellant would be able to work, write and contribute in some way towards the upkeep of her family should she return to Nigeria. She is well educated and has

varied work experience. She has been here for a relatively short period of time and has family in Nigeria. Having had regard to the relevant sections of 117B as outlined above and the decisions of Nasim and Others (Article 8) [2014] UKUT 00025 and MG (Assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113, I conclude that the decision of the Secretary of State is proportionate.

14. Mr Chohan stated that the appellant intended to serve further evidence which would establish that she has been sending money to her brothers abroad. I indicated to him that the evidence has not been served in accordance with the directions of the Upper Tribunal and, in any event, such evidence would not be material because it was accepted by the First-tier Tribunal that she sent money to her brother and there was no reason to interfere with this finding.

Notice of Decision

15. I dismiss the appeal under Article 8 of the 1950 Convention on human rights.
16. No anonymity direction is made.

Signed Joanna McWilliam

Date 17 June 2015

Upper Tribunal Judge McWilliam