



IAC-AH-SC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/17727/2014
IA/17728/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 17 November 2015**

**Determination & Reasons Promulgated
On 3 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR STANLEY SUNDAY ONWUJE
MISS ADAOBI GRACE OBIDIGWE
AND 2 DEPENDENTS
(ANONYMITY DIRECTION NOT MADE)**

Claimants

Representation:

For the Appellant:

Mr T Melvin (Senior Home Office Presenting Officer)

For the Claimant:

Mr W Evans, Legal representative, Templeton Legal Services

DECISION AND REASONS

1. For convenience I will refer to the parties as the Secretary of State who is the appellant in this matter and to Mr Stanley Sunday Onwuje who is the main Claimant. This matter comes before me as an error of law hearing in which I consider whether or not there was a material error of law in the First-tier Tribunal such that the

outcome of the decision would be affected. At the end of the hearing before me I announced my decision that I found a material error of law in the First-tier Tribunal decision. I now give my reasons.

2. The Claimant and his wife who is a dependant are both citizens of Nigeria. They have two young children born in the UK on 7.9.2010 and 5.10.2013. The Claimant first entered the UK in August 2008 with leave to enter as a student. Further leave was granted as a Tier 1 (Post-Study) Migrant and thereafter as a Tier 4 Student until 30 September 2013. An application for further leave was made outside of the Rules which was refused on 31 October 2013. The appeal was dismissed at a paper hearing on 7 February 2014. On 6 March 2014 the Claimant applied for leave to remain as a Tier 1 (Entrepreneur) (PBS) scheme. That application was refused by the Secretary of State in a letter dated 25 March 2014. She was not satisfied that the Claimant met the requirements of the Immigration Rules under paragraph 245 DD, namely that he was unable to show that he had access to £200,000 because he did not submit the specified documents and was awarded no points for funds.
3. The First-tier Tribunal (Judge James) ("the Tribunal") allowed the appeal under Article 8 ECHR in a decision promulgated on 16 December 2014. It was conceded by the Claimant's representative that he could not satisfy the Tier 1 (Entrepreneurs) rules or the Article 8 rules under Appendix FM. The hearing proceeded on the basis of Article 8 ECHR outside of the Rules.
4. The Tribunal found that the Claimant's desire to remain in the UK was based on his family's wish to remain in the UK and for him to continue running his business. It found that although the Claimant had not been able to furnish the specified documents, there was evidence to show that he ran a successful care employment agency in which he invested £40,000 and employed 75 people [19 & 20] and that the company was registered and incorporated on 14.5.2013. It found that the business was of such singular benefit to the UK that it warranted consideration outside of the Rules [30], and further that the interference was disproportionate [36]. The Tribunal found that the Claimants had fully complied with conditions under their visas and notified the Secretary of State of any changed circumstances [27].

Grounds of Application

5. The Secretary of State contends that the First-tier Tribunal made a material misdirection of law by allowing the appeal under Article 8 ECHR private life. The Tribunal made no reference to moral and physical integrity and reliance was placed on the fact that the Claimant ran a business and its positive economic consequences for the UK. [29] Further the Tribunal failed to take into account paragraph 117B Nationality Immigration & Asylum Act 2002 (as amended) that little weight should be given to private life established when a person's immigration status is precarious and the limited use for private life cases following **Nasim and Others (Article 8) [2014] UKUT 0025 IAC ("Nasim")**.

6. The Tribunal's approach when determining whether there were compelling circumstances in the Claimant's case not recognised by the Rules, was erroneous and failed to follow (Gulshan [2013] UKUT 00640 (IAC) and R (Nagre) v Home Secretary [2013] EWHC 720 (Admin)).
7. The Tribunal erred in its approach by using Article 8 to circumvent the Immigration Rules. There would be no interference with family life which could be carried on in Nigeria as opposed to the UK.
8. The Tribunal failed to consider why it would be unjustifiably harsh to require the claimant to return to Nigeria to make a further application and to provide the required documents in order to meet the Immigration Rules.

Permission to Appeal

9. On renewal before the Upper Tribunal permission to appeal was granted by Upper Tribunal Judge McWilliam on 9 September 2015 who found it arguable that the basis on which the Tribunal allowed the appeal is unclear, purporting to allow the appeal under Article 8 on the basis of family life [36], but at [29] it found that return of the family would not breach Article 8. It is arguable that there was no engagement of Article 8(1) in this case.

The error of law Hearing

Submissions

10. Mr Melvin relied on the grounds of application and a skeleton argument. He submitted that the findings were contradictory as to whether or not there was family life and whether or not the appeal was allowed on that basis. The Tribunal appeared to have allowed the appeal on the basis of the Claimant's private business interests which did not engage Article 8(1). It was open to the Claimant to make a further application by providing the specified documents and to do so did not amount to any unjustifiably harsh outcome for the Claimant. The decision was irrational. Article 8 was not a general dispensing power and the Tribunal had used it as such. This was contrary to the approach of the Supreme Court in Patel and Others. Mr Melvin also relied on RU (Sri Lanka) [2008] EWCA Civ 753 and UE (Nigeria) [2010] EWCA Civ 975. The Tribunal had effectively used the Claimant's business as a freestanding factor to tip the scales in his favour.
11. Mr Evans relied on the Rule 24 response. It was accepted that the Claimant could not meet the Immigration Rules under Tier 1. The appeal related to both the Claimant and his wife, and Article 8 matters should nevertheless be considered under points-based scheme applications.
12. The main thrust of the claim was the private life established through business and residence in the UK over the last seven years. The Claimant employed over 100 people and the business was considerable. The Tribunal had considered the public interest to the extent that employees of the business would be put out of work in the

event of the Claimant returning to Nigeria. The Tribunal adopted a broad approach to Article 8 consistent with UE (Nigeria). The Tribunal properly followed the approach in Nagre and concluded there were relevant circumstances not covered by the Rules and found it to be an exceptional case.

13. Mr Melvin responded that the PBS Rules were premised on the requirement to have enough finance to start and run a business. The fact that the Claimant was running a business was not an exceptional factor. The Tribunal failed to take into account that the Claimant had no lawful leave when the business was set up and that he had failed to meet the requirements of the Rules. This was an irrational decision.

Discussion and Decision

14. The first ground of appeal contends that the Tribunal's findings as to family life are contradictory and unclear. In the decision and reasons [28] the Tribunal found all family members were Nigerian citizens, there was a family home in Nigeria and links and contacts were maintained with extended family members. There were no health or other problems. At [29] the Tribunal found that a return of the family unit to Nigeria would not breach family life under Article 8 ECHR. However at [30] the Tribunal found that the right to respect for family life was engaged and the decision made by the Secretary of State was disproportionate. This amounts to an error of law and this ground of appeal is made out.
15. The second ground of appeal contends that the Tribunal erred in its approach to private life in Article 8(1). On reading the decision as a whole it is clear that the Tribunal's main focus under Article 8 was on private life rather than family life. The Secretary of State argues that the Tribunal materially erred in concluding that Article 8(1) was engaged through the Claimant's running of a business and its economic benefit to the UK. I agree with the submissions made by Mr Melvin. The Tribunal failed to follow the approach in "Nasim" [13-21 & 22-24] in which the Upper tribunal endorsed the view taken by the Supreme Court in Patel and others v SSHD (2013) UKSC as to the limited scope of private life and the application of a near miss argument. The Tribunal erred in concluding that the first two questions in Razgar, R (on the application of) v SSHD [2004] UKHL 27 were answered affirmatively, where the Claimant relied on private life established in precarious circumstances and the evidence related to business and economic matters. There was no evidence as to any private life relevant to physical or moral integrity. The Tribunal found that, "the profitable and successful nature of the first appellant's business (and its positive consequences for patients and staff, as well as the economy of the UK by way of income and tax paid), together with the full compliance of visa conditions and the credibility of both the appellants, are most persuasive factors when placed against the formalistic nature of the refusal regarding designated documents, and the need for an effective immigration system." [30] I am satisfied therefore that the Tribunal has treated the matter as a "near miss" and/or a general dispensing power for cases which do not meet the Rules.

16. In any event I find that any interference would be proportionate to the legitimate end; namely the operation of a coherent and fair system of immigration control. The success or failure of a business venture is not a matter by which the respect for private life can be judged. It could be a factor in weighing public interest in the maintenance of immigration control and where the Tribunal would have regard to section 117 Nationality Immigration & Asylum Act 2002 (as amended). In that regard the Tribunal has erred in its failure to place weight on the strong public interest in the legitimate end.

Error of law decision

18. I find that the decision and reasons discloses a material error of law with regard to Article 8(1) that family and/or private life is engaged. I set aside the decision.

Re making

19. I now go on to remake the decision by dismissing the Claimant's appeal on immigration and on human rights grounds. The Claimant failed to meet the relevant Immigration rules under the PBS and in respect of family and private life. There is no justification to consider the matter outside of the Rules which fully cover the circumstances of setting up and running a business. The evidence relied on before the Tribunal fails to engage Article 8(1) private life. It is reasonable to expect that the Claimant could make a further application by producing the required specified documents to show that he had access to the funds, and he could make such an application from Nigeria. There is no interference with family life. The "private life" was established in precarious circumstances which carries weight having regard to section 117 2002 Act (as amended) and the Claimant had made no application under the rules when the business was set up. In assessing the public interest, which is seeking to achieve a fair and coherent immigration system, any interference is proportionate, notwithstanding the positive economic contribution made in setting up and running the business or the potential impact of its demise.

20. Decision

There is a material error of law.

The appeal of the Secretary of State is allowed.

The Claimant's appeal is dismissed under immigration and human rights grounds.

No anonymity direction is made.

Signed

Date 26th November 2015

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

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

Signed

Date 26.11.2015

GA Black
Deputy Upper Tribunal Judge G A Black