IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19936/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 March 2015	**On 22 April 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS TOLULOPE OLUKAYODE ODUBONOJO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Dr D Akin-Samuels of JDS Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Appellant (hereinafter called the Secretary of State) against the decision of the First-tier Judge Hodgkinson, who sitting at Hatton Cross on 26 November 2014 and in a subsequent determination promulgated on 11 December 2014 allowed the appeal of the Respondent (hereinafter called the claimant), a citizen of Nigeria born on 20 August 1985, against the decision of the Secretary of State dated 24 April 2014 to issue directions for her removal from the United Kingdom to Nigeria having refused the claimant's Article 8 ECHR application.

2. In that regard ground 1 contends that the First-tier Judge's conclusion that the provisions of Appendix FM were not applicable as the application was made on 2 April 2012 was wrong in law and it is accepted by the parties that the Judge was clearly in error of law in reaching that conclusion. It was thus contended by the Secretary of State in her grounds that "the entire premise of the determination is fundamentally flawed as the Judge has failed to consider at all the Secretary of State's view as to the public interest". It is further contended that the First-tier Judge gave inadequate reasons for findings relating to family life and reoffending.

3. In his determination the Judge succinctly summarised the claimant's immigration history as follows:

> "2. The Appellant claims to have entered the United Kingdom in September 2000 as a visitor although the Respondent has noted that no documentary evidence of the date of entry has been produced y the Appellant. In any event on 19 August 2002 the Appellant submitted an application for a 'no time limit' stamp to be placed in her passport. On 30 October 2002 that application was considered to be void.
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> 3. On 4 April 2011 the Appellant submitted an application for indefinite leave to remain (ILR) on human rights grounds but that application was refused on 21 June 2011, with no right of appeal. On 28 June 2011 the Appellant was arrested on suspicion of fraud and immigration offences. She was served with a notice of liability to removal.
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> 4. On 1 September 2011 the Appellant was convicted of possessing and controlling identity documents with intent of making false representations to make gain for self or another. She was sentenced to six months' imprisonment. It appears to be common ground that this offence or offences relates to an attempt by the Appellant to use false identity documents for the purpose of obtaining employment in the United Kingdom.
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> 5. On 2 April 2012 the Appellant made her application for leave to remain on human rights grounds which application was refused on 4 July 2013 with no right of appeal. On 17 July 2013 a pre-action Protocol letter was submitted on the Appellant's behalf and, on 4 September 2013, a judicial review application was lodged on her behalf. On 4 October 2013 a consent order was signed whereby the Appellant withdrew the judicial review proceedings on condition that the Respondent reconsidered the decision to refuse her application for leave to remain.
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> 6. On 9 December 2013 another pre-action Protocol letter was submitted on behalf of the Appellant. On 3 January 2014 the Respondent responded to that letter, confirming that the reconsideration of the leave to remain application would take place. That reconsideration ultimately resulted in the decision presently under appeal."

4. The Judge then referred to the detailed reasons for the Secretary of State's decision as set out in her refusal letter dated 24 April 2014 that were, as he recorded, amplified by the Presenting Officer's oral submissions before him.

5. The Judge proceeded to set out the Secretary of State's position as follows:

> "8. In effect the Respondent:
>
> 1) indicated that the Appellant failed to satisfy the relevant suitability requirements under Appendix FM, bearing in mind that she was sentenced to six months' imprisonment on 1 September 2011 following the conviction referred to, it being concluded the Appellant's presence in the United Kingdom was not conducive to the public good;
>
> 2) in any event, noted that the Appellant did not have a partner in the United Kingdom, it also having been confirmed that the Appellant did not have contact with the father of her child [I will leave the child's name blank] born on 21 March 2014;
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> 3) did not accept that the [the child] was British, she having no father listed on her birth certificate and no evidence having been produced to show that her father was British or had any contact with her;
>
> 4) noted that [the child] had not been in the United Kingdom for seven years, bearing in mind her age and that neither the Appellant nor her daughter was entitled to leave with reference to the various requirements of Appendix FM, it being considered reasonable for the Appellant and [the child] both to leave the United Kingdom and to live in Nigeria;
>
> 5) noted that the Appellant claimed to enjoy family life in the United Kingdom with her parents and siblings but concluded that such relationships did not constitute family life under Appendix FM and that the Appellant had, in any event, failed to establish that her dependency upon her relatives went beyond normal emotional ties;
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> 6) indicated that due consideration had been given to the interests of [the child] under Section 55 of the Borders, Citizenship and Immigration Act 2009 ('the 2009 Act');
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> 7) indicated that the Appellant and [the child] could not meet the requirements of paragraph 276ADE with reference to their private lives in the United Kingdom;
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> 8) concluded that there were no exceptional circumstances which warranted the grant of leave to the Appellant and her daughter outside the Immigration Rules and that her decision was a proportionate one."

6. I pause there because clearly in setting out in such detail the Secretary of State's position under the Rules, it follows that the Judge had the relevant Immigration Rules in mind before he proceeded with his further consideration of this appeal.

7. The Judge noted *inter alia* that the claimant was 15 years old when she arrived in the United Kingdom and was at the date of hearing 29 years old. She had lived with her parents since her arrival in the UK in 2000 and continued to do so. The claimant, her parents and three siblings still lived

together in the same household. They were all British citizens, the claimant being the only child of her parents born in Nigeria. With reference to the claimant's criminal conviction the Judge noted that:

> "She sincerely apologises for such foolish behaviour and has no intention of committing any further offences. The offence itself was committed by her in order to obtain relevant identity documentation to enable her to work in the United Kingdom."

8. It was further noted that on 21 March 2014 the claimant gave birth to her daughter as a result of a relationship that no longer continued and her daughter lived with the claimant in the same family household, there being no contact with the child's father.

9. The claimant was now dependent on her parents to provide for her and her daughter "emotionally and financially and with regard to evidence on how to bring up her daughter, her parents clearly were her daughter's grandparents and they and the claimant's siblings all formed a close family unit."

10. The Judge recorded that the claimant, who gave oral evidence before him, was scared of the prospect of having to return to Nigeria with her daughter where she had no accommodation or means of settling down. It would be impossible for all of the claimant's family to visit her daughter in Nigeria. Further she enjoyed a close interdependent relationship with her parents and siblings. The claimant's mother worked as a project manager and was also a minister of religion being a pastor in her church. She was on lifetime medication for a heart condition. The claimant's father was a career guidance consultant.

11. The Judge heard oral evidence from the claimant but also from her parents and three siblings and took further account of documentary evidence in support. He then proceeded to make detailed findings and at paragraphs 24 and 25 of his determination he had this to say:

> "24. The Respondent's RFRL focuses upon the Appellant's inability to satisfy the requirements of Appendix FM and paragraph 276ADE of HC 395, reference being made to the Appellant's inability to set aside the suitability criteria due to her criminal conviction. [Her daughter] is not directly a party to the present appeal but it is clear that were the Appellant to be removed from the United Kingdom [her daughter] would be removed with her.
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> 25. During the hearing before me I indicated that it was my view that the new Immigration Rules, namely Appendix FM and paragraph 276ADE, did not apply to the present appeal as the Appellant's relevant application was submitted on 2 April 2012, prior to the coming into effect of the new Rules. Consequently, **and as acknowledged by both representatives, the Appellant's appeal falls to be determined in accordance with relevant case law**" (my emphasis).

12. The Judge proceeded to consider relevant case law guidance, in particular that in Razgar [2004] UKHL 27 and ZH (Tanzania) [2011] UKSC 4, Beoku-Betts [2008] UKHL 39 and Huang [2007] UKHL 11.

13. Further and for the avoidance of doubt the Judge was clear that he had borne in mind the provisions of Section 117B of the Immigration Act 2014

> "whereby little weight should be given to an individual's private life established in the United Kingdom when they were unlawfully here and this clearly applies to both the Appellant and [her daughter]. I bear this fact fully in mind and I have given little weight to the establishment of their private lives in these circumstances."

14. I pause there because this yet further exemplifies the Judge's awareness of the provisions of the new Rules that he had borne in mind in reaching his findings. The Judge continued:

> "I bear this fact fully in mind and have given little weight to the establishment of their private lives in these circumstances. That said, as I have indicated above, I conclude that the Appellant has not only established a significant private life in the United Kingdom but that she has also established and continues to enjoy a longstanding and close family life with her parents and siblings and I take that fact into account in addition."

15. The Judge continued with further reference to the 2014 Act that the claimant clearly spoke fluent English; that she was not financially independent; that there was no suggestion that she had at any stage been a burden on taxpayers; that it was in the public interest that persons seeking to remain in the UK were financially independent.

16. He continued at paragraph 39 of his determination to point out that he had taken into account the fact that the claimant was only 15 when she arrived in the UK with her grandmother and then lived in the UK with her parents and therefore "no blame could realistically be laid at her feet in terms of her overstaying".

17. At paragraph 40 the Judge took into account the fact that the Appellant had not been in Nigeria for over fourteen years and that the evidence before him that was materially unchallenged satisfied him that the claimant had no-one in Nigeria to whom she could turn and no accommodation. The Judge continued:

> "Whilst I do not find this factor in itself to be determinative or insurmountable, it is nevertheless a factor of relevance when viewed cumulatively, the Appellant having spent her entire adult life to date and the latter part of her minority living in her immediate family unit in the United Kingdom. Also of relevance I find is the fact that both her parents but more particularly all three of her siblings are British citizens."

18. The Judge continued that he also found it to be "highly relevant in my consideration of proportionality" that the claimant's criminal conviction was serious in that it resulted in a sentence of six months' imprisonment but that did not disclose on the evidence nor indeed was there any

suggestion that the claimant was likely to repeat that offence or any other criminal offence and he accepted that she did not intend to do so. Nevertheless, the Judge pointed out, it was a factor "which I find weighs materially against her in terms of proportionality although I recognise and acknowledge that this is not a deportation appeal."

19. The Judge thus concluded "on the particular facts of this appeal" that the Secretary of State's decision involved a disproportionate interference with the claimant's rights under Article 8(2) and thus succeeded on human rights grounds.

20. The Secretary of State's challenge at ground 2 is based on the contention that the Judge failed to give any or any adequate reasons as to how the test in Kugathas [2003] EWCA Civ 31 was met.

21. At ground 3 it is contended that the Judge failed to refer to any evidence before him that suggested that the claimant would not reoffend other than her live evidence.

22. Finally it was contended that the Judge should have had regard to the provisions of Section 117C of the 2002 Act. Whilst accepting that this was not directly applicable it was contended that Parliament had expressed its clear view on the treatment of Article 8 appeals in cases involving foreign national offenders.

23. Thus the appeal came before me on 17 March 2015 when my first task was to decide whether the determination of the First-tier Judge disclosed an error on a point of law such as may have materially affected the outcome of the appeal. The question for me was not whether the appeal against the decision under challenge by the Appellant should be allowed or dismissed. The appeal before me was concerned only with the question of whether the First-tier Judge made an error of law of a nature such as to require his decision to be set aside. It is only if that question returned a positive answer, that it was open to the Upper Tribunal to disturb the decision of the First-tier Tribunal Judge.

24. At the outset of the hearing, I received from Dr Akin-Samuels his skeleton argument which, as he most fairly acknowledged, was essentially a repeat of the claimant's position as it was before the First-tier Judge. I also received from Mr Avery for the Secretary of State a transcript of the decision in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC). Further (and I must admit at my request but I think Mr Avery appreciated that it was a case relevant to the outcome of my consideration) Mr Avery most helpfully provided me with his copy of the decision in R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) (IJR) [2014] UKUT 539 (IAC).

25. With regard to the case of Gulshan Mr Avery relied on paragraph 27 in which it was inter alia stated:

> "Only if there were arguably good grounds for granting leave to remain outside the Rules was it necessary for [the Judge] for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules."

26. I have to say that on my reading of the First-tier Judge's determination it was apparent to him that there were arguably good grounds for granting leave to remain to this Appellant outside the Rules thus necessitating the need to consider her position for Article 8 purposes and in determining for the reasons that he gave that there were compelling circumstances not sufficiently recognised under the Rules.

27. That of course is not to say that the Judge was not in error.

28. It was Mr Avery's submission that the Rules could not be ignored because they demonstrated where the public interest lay in terms of Article 8. Such an observation was entirely appropriate but nonetheless does not take into account the observations made in Gulshan to which I have above referred. Mr Avery further submitted that whilst there were matters in the Appellant's favour there were factors against him. So, he submitted, it therefore did not follow that the Judge but for his error, would have reached the same conclusion if he had not applied the new Rules. Mr Avery further submitted that the Judge did not say why removal would be disproportionate and in consequence he maintained that it was not a safe determination "because one does not know what conclusion the Judge would have reached had he applied the Rules".

29. This of course took me to drawing to the parties' attention the head note of Oludoyi (above) and to refer to paragraph 20 of Oludoyi where Upper Tribunal Judge Gill had this to say:

> "There is nothing in Nagre, Gulshan or Shahzad that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. If, for example, there is some feature which has not been adequately considered under the Immigration Rules but which cannot on any view lead to the Article 8 claim succeeding there is no need to go any further. This does not mean that a threshold or intermediate test is being applied."

Assessment

30. I shall deal first with ground 1 where, as I have earlier said, it was common ground that the First-tier Judge erred in law. In so doing I have reminded myself that in the recent case of Singh [2015] EWCA Civ 74 it was held that applications for leave to enter or remain in the UK on the basis of family or private life made before 9 July 2012 and determined between that date and 5 September 2012 were governed by the Immigration Rules as they stood before the changes introduced by HC 194 and HC 565. However, applications made before 9 July but determined on or after 6

September 2012 were governed by the Rules as amended by HC 194 and HC 565.

31. It follows that the Judge did err in law in his understanding that the new Immigration Rules, namely Appendix FM and paragraph 276ADE, did not apply to the present appeal notwithstanding the fact that, as he recorded and despite the Secretary of State's present challenge, his view that they did not apply was "acknowledged by both representatives at the Appellant's appeal".

32. I have, however, had to ask myself given that the First-tier Judge allowed the appeal outside the Rules (as he appears to have done in applying relevant case law guidance against the backdrop of the facts as found) on what basis does the Secretary of State say that the present appeal does not succeed outside of the new Rules?

33. This is a Judge who concluded that upon a consideration of relevant case law (i.e. outside of the Rules) he found in the claimant's favour. It follows therefore that the Secretary of State has to demonstrate that in so doing, the Judge materially erred in law in that he would not have allowed the appeal outside the Immigration Rules, if he had found, as appears to be suggested, that the claimant could not succeed under the new Rules.

34. In that regard it is apparent to me that the Judge in considering the proportionality of the claimant's removal together with her child to Nigeria did consider the relevant case law guidance to which I have above referred. In the light of his treatment of the authorities, I do not think it can reasonably be said that he did not have the correct principles in mind.

35. The contention in ground 2 that the Judge failed to give very good reasons for finding the test in Kugathas was met is not reflected in my consideration of the Judge's findings. In terms of whether the claimant had established elements of dependency going beyond the normal emotional ties, the Judge took account of the fact that the claimant had lived with her parents and siblings in the same family home continuously for over fourteen years having arrived here at the age of 15 and that she now had a young child born as recently as March 2014.

36. At paragraph 30 of his determination the Judge was clear as to his conclusion that the claimant had

> "established a significant family life with her parents and siblings and also with her daughter, bearing in mind that she has lived in the same household as the parents and her siblings since 2000 and continues to do so, it also being clear, **and I would add unchallenged**, that she has throughout been financially dependent on her parents and continues to do so." (Emphasis added).

37. More particularly, the Judge continued:

> "Whilst I entirely acknowledge that the normal ties between parents and adult children does not generally constitute family life in the context of

> Article 8, in the circumstances as found by me I conclude that it does demonstrate that the ties between the Appellant and her parents going beyond the normal emotional ties which might exist."

38. I am thus satisfied that the challenge to that finding on the part of the Secretary of State amounts to no more than a factual disagreement and I find that it discloses no error of law.

39. As to ground 3, the Secretary of State's challenge fails to place into its proper context what the Judge had to say about the claimant's criminal conviction in that he was clear that he was satisfied on the evidence that the Appellant was not

> "likely to repeat that or any other criminal offence and I accept that she does not intend to do so, she appearing to recognise that was a serious mistake on her part for which she has completed her criminal sentence."

40. I bear in mind in that regard, that the Judge had the opportunity of seeing and hearing and evaluating the quality of the oral evidence that the claimant gave before him. He will also have been mindful that his decision was reinforced by the fact that the Appellant's conviction was some seven years ago since which time she had not reoffended.

41. The Judge was clear that it nonetheless remained a factor which he found "weighed materially against the Appellant in terms of proportionality".

42. As the grounds acknowledge, Section 117C had no application in this case as apart from the fact that as the Judge rightly noted: 'this was not a deportation appeal', s.117C does not apply to a person who has not been sentenced to a period of twelve months or more and this claimant was sentenced to six months' imprisonment. Further the Section points out that whilst the deportation of foreign criminals is in the public interest the more serious the offence committed the greater is the public interest in deportation of the criminal. In this particular case and indeed as the Judge properly recognised "this was not a deportation appeal".

43. It is apparent to me that the Judge found that there were exceptional circumstances outside of the Immigration Rules here that in turn fortifies me in the view that had the Judge applied the proper test he would have reached the same conclusion. Therefore, although there was an error of law in this case, and I make the point that the Secretary of State was perfectly entitled to bring the appeal as she did, I am equally satisfied that the decision was not affected by that error of law and therefore I dismiss the Secretary of State's appeal.

Decision

44. The making of the previous decision did not disclose the making of an error on a point of law and I order that it shall stand.

45. It follows that the appeal of the Secretary of State to that decision is dismissed.

No anonymity direction is made.

Signed Date 9 April 2015

Upper Tribunal Judge Goldstein