Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31379/2014

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated**	**Determination**
On 23 September 2015		**On 25 September 2015**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

VIVIEN CHIMWAN DAMS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Charlton, Counsel
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. The Appellant is a citizen of Nigeria. She appeals against the respondent's decision dated 17 July 2014 refusing her leave to remain on Article 8 ECHR grounds and seeking to remove her to Nigeria by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant's immigration background is set out at [4] to [5] of the Tribunal's decision promulgated on 27 August 2015 and I do not repeat it save as necessary below.

3. The Appellant's appeal was allowed by First-Tier Tribunal Judge Suffield-Thompson in a decision promulgated on 18 March 2015. Permission to appeal that decision was granted to the Respondent by First-Tier Tribunal Judge Chohan on 1 June 2015. In the decision promulgated on 27 August 2015, the Tribunal found that the decision of First-Tier Tribunal judge Suffield-Thompson contained a material error of law and we therefore set it aside. The matter comes back before me in order to re-make the decision.

Submissions

4. Ms Charlton indicated at the start of the hearing that the facts of the Appellant's case had not changed since the hearing before the First-Tier Tribunal. She relied on the oral evidence as recorded in the First-Tier Tribunal decision (which was not disputed) and on the Appellant's written statement and other documents in the Appellant's bundle which were before the First-Tier Tribunal. She indicated that although the Appellant and her step-daughter Ms Kerr were present in court she did not intend to call either of them to give oral evidence. The Appellant was content to limit the hearing to submissions on the evidence already produced.

5. Mr Jarvis and Ms Charlton both submitted skeleton arguments for the hearing. I indicated at the outset that the authority which appeared to me to be most relevant to this case was Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387 ("SS") on which Mr Jarvis relied in his skeleton argument. I also directed the parties to the case of Singh and Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 ("Singh [2015]") as relevant to the potential issue which arises in this case in relation to the existence of family life.

6. Ms Charlton made clear that the Appellant's case was limited to a claim outside the Rules based on compelling circumstances. The Appellant came to the UK as a domestic worker and had leave on that basis. She instructed her representative to make an application for further leave

and was unaware that she had been refused leave and was in the UK unlawfully. Ms Charlton fairly accepted that the evidence showed that the Appellant discovered that she had been refused leave in 2004 but she was told by her representative that he had lodged an appeal and she thought that her case was still under appeal. The Appellant made a complaint about her representative in 2010. I permitted Ms Charlton to adduce a bundle of documents in relation to this issue at the hearing with no objection from Mr Jarvis as it seemed to me that this formed a large part of the Appellant's case and the Tribunal needed full information. The documents indicate that the Appellant was unable to obtain any satisfaction in relation to her complaint as the representative was not a solicitor and was at the relevant time running his own business and not part of a firm. Her file had therefore been closed. On its own, Ms Charlton accepted that this factor could not render removal disproportionate but when placed in the balance with the other factors and weighed against the public interest, she submitted that it might tip the balance.

7. In relation to family life based upon extended family relationships, Ms Charlton relied on Abbasi and another (visits-bereavement-Article 8) [2015] UKUT 00463 (IAC) whilst accepting that it related to a very different factual context. Ms Charlton relied on the extent of the Appellant's ties with Mr Phillips' children and grandchildren particularly Ms Kerr and her children with whom the Appellant had a deep loving relationship. Ms Charlton submitted that removal of the Appellant would be a disproportionate interference also with the rights of those children and grandchildren. In response to a question from me, Ms Charlton obtained instructions that the grandchildren are no longer minors. Ms Kerr's children for whom the Appellant cared when they were aged thirteen and fourteen years are now aged twenty-two and twenty-four. The two children of Ms Garnish, the other of Mr Phillips' daughters who provided a letter of support are now aged eighteen and twenty-three. Whilst Ms Charlton accepted that the Appellant no longer lives in the immediate vicinity of Mr Phillips' children and grandchildren, this is not a great distance (they live in Hertfordshire and the Appellant lives in Middlesex). Ms Charlton noted also the evidence that the Appellant is part of Mr Phillips' family and is an integral part of their "get- togethers". Removal of the Appellant would have a disproportionate impact also on them.

8. Ms Charlton relied also in support of the Appellant's case on the fact that she has educated herself at her own cost in the UK and has a strong social life with friends. The Appellant works in the UK for a care agency. Ms Charlton relied on the summary of the Appellant's case and evidence as recorded at [16] and [17] of the First-Tier Tribunal decision of 18 March 2015 and the documents in the Appellant's bundle.

9. In terms of the public interest, Ms Charlton fairly accepted that the Appellant faces a difficult task in persuading me that interference would be disproportionate when considered through the lens of section 117B Nationality, Immigration and Asylum Act 2002 ("s117B). She accepted

that, at best, the Appellant's status has been precarious throughout much of her stay in the UK but asked me to note the difficulties which the Appellant faced due to the conduct of her representative to whom she entrusted the regularisation of her status and to adjust the weight accordingly. She accepted that the fact the Appellant speaks English and is financially independent does not reduce the weight to be accorded to the public interest (applying AM (S117B) Malawi [2015] UKUT 0260 (IAC)). She asked me to take account of those matters, however, as evidence of the Appellant's integration in the UK.

10. Mr Jarvis relied on the test set out at [33] of SS. It is common ground that the Appellant cannot meet the requirements of the Rules in relation to Article 8 ECHR. The relevant test is therefore whether there are compelling circumstances which should entitle the Appellant to succeed in her claim outside the Rules. Even if there are compelling circumstances, though, those can still be outweighed by the public interest and the issue for me to determine is whether removal would be disproportionate.

11. In relation to whether the case concerns private life or also family life, Mr Jarvis accepted that the Appellant was granted leave based on family life until 2014 on the basis of her relationship with Mr Phillips. The Appellant had clearly been through a difficult period due to the death of Mr Phillips but her bereavement unfortunately means that she can no longer rely on her family life with a partner as a basis for further stay. The issue is whether the ties between her and Mr Phillips' children and grandchildren amount to family life. He accepted that there were family ties and those may have been stronger when Mr Phillips was alive but he submitted that those ties could not amount to family life now. The Appellant lives separately from Mr Phillips' family in a different area and the evidence of Ms Kerr is that she sees the Appellant once a month. There is evidence of ties with Mr Phillips' grandchildren, particularly those who the Appellant cared for when they were younger. He referred to [21] of Singh v Entry Clearance Officer, New Delhi [2004] EWCA Civ 1075 and the reference there to Marckx v Belgium. Much depends on the facts. The relationship between the Appellant and Mr Phillips' family is not a blood relationship. As at the date of the hearing, there is no evidence of close involvement sufficient to amount to family life. Mr Jarvis accepted that Singh [2015] makes the point that it may make little difference whether a claim is considered on the basis of family or private life.

12. Mr Jarvis submitted that the factors relied on are generally those considered within the Rules – length of residence, working in the UK, social contacts etc. His primary submission therefore was that the appeal should fail on that basis as there are no other compelling circumstances. However, he fairly accepted that it might be argued that the relationship between the Appellant and Mr Phillips' children and grandchildren is a factor which could not be considered fully within the Rules. The same could be said for the facts relied on by the Appellant to explain her unlawful stay in the UK (in relation to the

conduct of her representatives). He submitted however that the Appellant's argument that she should be granted leave because of the conduct of her representatives and the assertion that, but for that conduct, she would have met the Rules amounted to an impermissible "near miss" argument. It was also speculative as whether she would have succeeded depended on factors such as permitted switching between categories at the relevant time. For this factor to weigh in the balance, the Appellant would have to show that there is no dispute that she would have succeeded but for her representative's conduct.

13. In relation to a claim under the Rules, the Appellant clearly does not meet paragraph 276ADE. She has not been in the UK for 20 years. There are no very significant obstacles to her reintegration in Nigeria. That is a very high threshold. The Appellant has some family left in Nigeria. The Appellant works in the UK and worked lawfully when she first came to the UK and since she was granted discretionary leave in 2011. The Respondent accepts that she is financially independent but that is not a factor which accords positive weight in the balance. The same is true of her ability to speak English. Mr Jarvis submitted that the Rules provide a number of routes for migration as a worker and those Rules reflect the Secretary of State's views as to the categories of migrant that should be permitted to remain in the UK for work. The Appellant does not seek to suggest that she can bring herself within any of those categories as a worker. He submitted therefore that little weight should be given to her private life claim based on her employment (even though it was accepted that she had been working lawfully in the UK based on her discretionary leave).

14. The Rules provide for leave based on periods of residence and for family relationships. The length of residence on which the Appellant relies is less than the period required by the Rules and the family relationship relied upon does not fall within the Rules. Little weight should be given to a private life formed when a person's status is unlawful or precarious (section 117B(4) and (5)). Even if the ties relied upon amount to family life, interference with that family life would be limited in circumstances where the family is separated geographically already with the UK and those ties could be continued by communication from abroad. Mr Jarvis accepted that I should consider the impact of removal of the Appellant on Mr Phillips' children and grandchildren but submitted that interference with their human rights would be proportionate in the circumstances. Even if those ties do amount to compelling circumstances, Mr Jarvis submitted, they are outweighed by the public interest in light of the precarious/unlawful status of the Appellant in the UK at the time that the Appellant's private/family life was formed (although he accepted per Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC) that establishment of private and family life is a continuum and not limited to a person's status when that is initially created).

Decision and reasons

15. As noted above, it is common ground that the Appellant cannot meet the requirements of the Immigration Rules in relation to Article 8 ECHR. She does not meet the family life rules. She has not been in the UK for 20 years. She retains ties with Nigeria and Ms Charlton confirmed that it was not the Appellant's case that there were very significant obstacles to her reintegration in Nigeria albeit she did not wish to return. I do not accept Mr Jarvis' submission that the whole of the Appellant's claim is one which stands or falls under the Rules. At the very least, the relationship with Mr Phillips' children and grandchildren is not capable of consideration under the Rules and I also take account of the Appellant's case that she is not to blame for her unlawful status in the UK throughout some of the period of her stay. I therefore go on to consider the Appellant's Article 8 claim outside the Rules.

16. Article 8 protects the right to private and family life. However, it is not an absolute right. The State is lawfully entitled to interfere with an appellant's private and family life as long as it is pursuing a legitimate aim and the interference is necessary and proportionate in all the circumstances of the case.

17. I deal first with the extent and nature of the Appellant's Article 8 claim. The Appellant has been in the UK since 20 December 2000. Initially, she was here with leave as a domestic servant in a private household. She had leave in that category until December 2002. The Appellant accepts that from then until April 2011 she had no leave to remain. I deal below with the reasons for that. On 19 April 2011, the Appellant was granted three years' discretionary leave as the partner of Mr Phillips. Mr Phillips died on 5 June 2013. The Appellant sought further leave to remain based on her Article 8 rights and it is the refusal of that application in July 2014 which gives rise to this appeal. On the basis of the foregoing chronology, the Appellant has been in the UK for a total of six and a half years lawfully and eight years unlawfully.

18. The Appellant submits that the weight to be given to her private life should be adjusted to reflect the fact that she was not to blame for her unlawful status. Her evidence is that, in October 2002, she asked her representative to make a further application for leave as a domestic worker, apparently on the basis of being or becoming a domestic worker in Mr Phillips' household. At about that time, she started to study in the UK. She received correspondence from her representative that "appeared to confirm" that he had made the application on her behalf and so she waited for a decision. In 2004, having received no satisfactory response from her representative, she contacted the Home Office directly and was told that her application had been refused. After some prevarication, her representative admitted that he had received the refusal letter. He indicated that the refusal was based on the application being out of time. He told the Appellant that he was convinced he had submitted the application in time and so had lodged an appeal. The Appellant says that she was only given one page of the

refusal letter and nothing in relation to her appeal. She did not change representatives at that time.

19. The Appellant admits to having difficulties pursuing her studies due to lack of any evidence as to her immigration status. Her lack of evidence as to her status came to the fore in 2009 when the Appellant needed to undergo an operation. She contacted the Home Office again but was unable to provide them with details as she only had one page of the refusal letter. The Home Office indicated that it could not locate her records. In February 2010, the Appellant finally sought advice from a solicitor who, having contacted her representative, was able to inform the Appellant that the representative had not appealed as he considered her case to be unmeritorious. Thereafter, via her solicitors, the Appellant lodged the application which led to her being granted the period of discretionary leave to which I refer above. The bundle of documents relating to the Appellant's complaint about her representative bears out the Appellant's statement in this regard, as would be expected since of course the complaint was not made until 2010. The complaint has not been pursued as the Appellant's representative is not a solicitor and the firm for whom he now works was not instructed in her case and could bear no responsibility. At the time, the representative was working for an OISC firm which could not be investigated by the Legal Complaints Service. The file has therefore been closed.

20. I do not consider that the above amounts to compelling circumstances which require consideration outside the Rules. Nor do I consider that those circumstances affect the weight which I am bound to give to the Appellant's private and if appropriate family life on the basis of her being here unlawfully. Whilst I accept the Appellant's version of events, it appears that she was aware from, at the latest, 2004 that her application had been refused. She was also aware that her representative was not providing a good service. It was clearly open to her at that time to remove her file from him and instruct solicitors or indeed to make a further application herself or via solicitors to seek to regularise her stay, particularly since she had by then embarked on a course of study which might have given her a reason to remain. Although the Appellant says that she was making continued efforts to progress her case, I find that she was not taking all the steps she could have done to regularise her stay and must have been aware during the period from at least 2004 until 2011 that she had no basis of stay.

21. I turn to consider the other elements of the Appellant's private life relied upon. The Appellant has undergone a number of educational courses, apparently at her own expense. She now works as a carer. She lives with her aunt who has provided a letter in support of her case. There are also a number of other letters of support from friends attesting to the fact that the Appellant is hard-working, pays her taxes and is self-sufficient and makes a contribution to society. She has no criminal convictions. She is involved in charitable causes and is active

in her local church. The Appellant says in her statement that she has an extensive network of friends. The Appellant notes that she suffers from a medical condition which necessitated an operation in 2009 since when she has been on medication and subject to periodic check ups. There is no other evidence as to this condition or the treatment which she is undergoing. It is not said that treatment for her condition is not available in Nigeria.

22. The Appellant relies also on the ties which she retains with Mr Phillips' children and grandchildren. The oral evidence of Ms Kerr, Mr Phillips' daughter, before the First-Tier Tribunal bears repetition. She indicated that the Appellant is part of a large, very close family consisting of five children, thirteen grandchildren and two great grandchildren. Ms Kerr and her two daughters moved in with the Appellant and Mr Phillips in 2004 and the Appellant cared for Ms Kerr's children as Mr Phillips was disabled. One of the children suffered from epilepsy and ADHD and the Appellant was the only person who Ms Kerr would trust to give medication to that child. As to the current situation, as noted at [7] above, both children are now adults. Ms Kerr gave evidence that, due to the nature of the Appellant's employment, they now see each other only about once a month. She does though record that she and the other family members would be devastated if the Appellant were removed.

23. The Appellant's own evidence as to the relationship is relatively brief. She speaks in her statement of the strong relationship she has with Mr Phillips' children and grandchildren and records that they are supportive of her. That is repeated in the record of her oral evidence before the First-Tier Tribunal but no particulars are given. Ms Kerr in her letter of support speaks warmly of the Appellant and regards her as a stepmother. Ms Garnish who is one of Mr Phillips' other daughters talks of the support which the Appellant gave to her father but there is little or no evidence of the relationship between Ms Garnish and the Appellant. There is limited other evidence and no statement or letter of support from the other children or grandchildren.

24. I readily accept that if Mr Phillips were still alive the fact that the Appellant was in a genuine and subsisting relationship with him would have led to the grant of a further period of discretionary leave and ultimately probably settlement. I am sympathetic to the predicament in which the Appellant finds herself and for her loss. However, based on the evidence as to the relationship with Mr Phillips' family following his death, I am unable to find that there exists the closeness of relationship which could amount to family life. As recognised in Singh [2015], whether relationships are categorised as family life may not matter as in any event they form part of a person's private life. The extent and closeness of the relationship whether categorised as private or family life is what ultimately matters. In this case, there is limited evidence about the nature and extent of the relationship.

25. Although not referred to in Ms Charlton's skeleton argument or submissions, the Appellant has also provided evidence in her statement and in oral evidence to the First-Tier Tribunal about the circumstances she would face in Nigeria and that is mentioned also in some of the letters in support of her case in evidence including from one of her sisters who now lives in Canada. Both of the Appellant's parents who lived in Nigeria are now deceased. She has at least one sibling (a brother) in Nigeria. She would not face any language difficulties but points out that she would have no home, job or friends there, having been in the UK for nearly 15 years. Nigeria has changed a lot in that time. She has though returned to Nigeria twice during the period she has been in the UK, in October 2013 and for six weeks in January 2014 when her mother passed away.

26. It is accepted by Ms Charlton that the Appellant does not meet the Rules and does not assert that these are very significant obstacles but they are matters which I should and do take into account when considering the proportionality of removal. I accept that the Appellant will face some difficulties in reintegrating in what will now be an unfamiliar country. However, she did not come to the UK until she was twenty-eight years old and has returned to Nigeria twice for short visits. She also has at least one family member who still lives there who can no doubt offer her some assistance however limited should she need it. The Appellant is an educated lady in her early forties who has shown the resourcefulness and determination to make a life for herself, study and find work in the UK when she came here apparently with nothing and no-one to assist her. She can maintain relationships with her friends and Mr Phillips' family in the UK via modern means of communications and visits and will no doubt establish a new network of friends as she apparently had before she came to the UK. In light of the foregoing, I find that I can give limited weight to those difficulties.

27. I turn then to consider the proportionality of removal taking account of all of the above matters. I do not set out the five stage test in Razgar. There is no issue concerning the engagement of and interference with the Appellant's Article 8 rights and the Respondent is clearly entitled by law to remove the Appellant. The only issue is therefore one of proportionality.

28. In relation to proportionality, I am required to have regard to the factors set out in section 117B. The maintenance of effective immigration control is in the public interest. I am required to give little weight to the Appellant's private life whether on the basis that this was formed whilst she was here unlawfully or precariously. As noted at [22] to [24] above, I accept that the Appellant continues to have ties to Mr Phillips' family but based on the evidence before me those are not so close as to amount to family life and I have taken those into account as part of the Appellant's private life. For the reasons given at [20] above, I do not consider that the matters on which the Appellant relies to excuse the unlawfulness of her status throughout much of her stay impact on the weight which I should give her private life. The

Appellant's private life has been formed when her immigration status was precarious insofar as it was not unlawful and I am therefore only able to give it little weight in any event.

29. I recognise that removal of the Appellant would impact on the members of Mr Phillips' family. However, there is limited evidence from those family members with the exception of Ms Kerr as to that impact and on that basis I am unable to find that the impact would be disproportionate when balanced against the public interest. There is no evidence relating to the effect of removal on any children within the family who may be affected by the decision.

30. I have taken into account all the factors relied upon by the Appellant in support of her private life claim as set out at [6] to [8] and [17] to [24] above. I have also taken into account the difficulties which the Appellant is likely to face in Nigeria following removal as set out at [25] to [26] above. However, when balanced against the public interest in removal due to the Appellant's unlawful and precarious status throughout her time in the UK, I conclude that removal of the Appellant would not amount to a disproportionate interference with her Article 8 ECHR rights.

DECISION

I dismiss the appeal. The Appellant does not meet the Immigration Rules in relation to Article 8 ECHR and I dismiss the appeal on human rights grounds outside the Rules.

Signed  Date 25 September 2015

Upper Tribunal Judge Smith