UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/38931/2014**

THE IMMIGRATION ACTS

Heard at: Field House
on 14 July 2015

Decision and Reasons Promulgated
On 28 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR OGHENE TEJIRI OTERI
NO ANONYMITY DIRECTION MADE

Respondent

Representation
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim, counsel (instructed by MA Consultants)

DETERMINATION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as"the claimant".

2. The claimant is a national of Nigeria, born on 30 October 1987. His appeal against the decision of the respondent dated 17 September 2014 refusing his application for further leave to remain in the UK and to set

removal directions was allowed under the Immigration Rules by First-tier Tribunal Judge Symes in a determination promulgated on 18 March 2015.

3. Two earlier applications for leave to remain had been refused on 18 February 2010 and on 6 June 2013. The present application was based on his relationship with a British citizen whom the claimant met in London. They have been together for two and a half years and have spent significant time together, at least twice a week.

4. The application was refused as their relationship did not meet the partner definition. Nor was the existence of the relationship accepted given the lack of evidence provided. Nigeria was a country where he could be expected to return. There were no exceptional factors outside the rules.

5. Judge Symes assessed the appeal on the basis of rules established since 9 July 2012.

6. He dismissed his claim under paragraph 276ADE of the Immigration Rules as he would not find it impossible to re-integrate in Nigeria.

7. He directed himself in accordance with authorities including Nagre and MM and Others [2014] EWCA Civ 985. He had regard to the European Court of Human Rights' decision in Uner v Netherlands which he considered to be useful in demonstrating circumstances in which the removal of a person with long residence from the UK was likely to infringe his private life.

8. There was no previous criminality in this case; there was thus less of a public interest in removal. Judge Symes found that his presence here had always been "precarious" [26]. However, he was brought to this country by adult members when he was a child, just before his 14th birthday; he had had no real choice in the matter.

9. Removing him from the UK would interfere with his private life and take him away from a society where he had numerous friends as well as a girlfriend who resides here and where he had studied with success. He had a real prospect of employment. To remove him would take him to a country where he had not lived for half his life and where he last resided as a youth and where he has no current connections [27].

10. Judge Symes considered whether the proposed interference was proportionate. He had regard to the importance of maintaining immigration control and having a clear and consistent system of rules by which foreign students are regulated. The claimant is a person of good character which is a relevant consideration as stated by Burnton LJ, in Miah and Others v SSHD [2012] EWCA Civ 261. He found that the claimant had consistently sought to play by the rules [28].

11. Judge Symes found that whilst not meeting the requirements of the rules, the claimant had been present in circumstances broadly consistent with the policy they enshrined. His length of residence here was not far short of

the 14 year benchmark where a person of immaculate character such as the claimant who had made an application before 9 July 2012, would ordinarily expect to be granted settlement [29].

12. He had lived in the UK for over 13 of his 27 years, close to half his life. He made his application when he was under 25. The rule which almost had benefited him 'conclusively' namely, the case of a young person under 25 who is not a minor, was not then in existence. There was no "reasonableness" requirement in such a case [29]. He would have had a strong application any time following his arrival here and before he reached majority, as a child of relatives present and settled here who had sole responsibility for his care. He had not formed any independent family unit before turning 18. Rule 298 was in force over that period.

13. However, Judge Symes realised that a near miss was as good as a mile [29]. It was nevertheless relevant that his circumstances tally with the circumstances under which leave under the rules would be appropriately given. He had regard to Lord Carnwath's statement in Patel and Others v SSHD [2013] UKSC 72 **[**at 55] that the balance drawn by the rules may be relevant to the consideration of proportionality.

14. Judge Symes had regard to s.117B of the 2002 Act which he set out in full at [30].

15. Whilst the claimant's Article 8 rights have been built on a stay which is precarious, that was referable to decisions made by adult relatives for which he cannot be held responsible. Although there are cases where it is appropriate to expect a person to recognise that his future does not lie in the UK once he reaches majority, in the claimant's case he was already well established in education at the time. He would not be a burden on the taxpayer. He speaks good English. Overall, the Judge found that this is a case where there would be unjustifiably harsh consequences rendering his return to Nigeria disproportionate. He accordingly allowed the appeal.

16. On 9 June 2015, First-tier Tribunal Judge Frankish granted the secretary of state permission to appeal. He found that it was arguable that the near miss principles relied on [29] were contrary to Miah and Patel.

17. Mr Whitwell submitted that the Judge applied a near miss argument and attached undue weight to the possibility that the claimant might have come close to meeting the requirements under the rules. He referred to SSHD v SS (Congo) and Others [2015] EWCA Civ 387. At [54] and following, "near miss" cases were debated. At [56] Lord Justice Richards stated that it cannot be said that the fact that a case involves a "near miss" in relation to the requirements set out in the rules is wholly irrelevant to the balancing exercise required under Article 8. If the applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify a grant of leave to enter outside the rules, the fact that the case is also a "near miss" may be a relevant consideration which tips

the balance under Article 8 in their favour. In such a case, he will be able to say that the detrimental impact on the public interest in issue if leave is granted in his favour will be somewhat less than in a case where a gap between the applicant's position and the requirements of the rules is great and the risk that they may end up having recourse to public funds and resources is therefore greater.

18. That was different from a case where the claimant contended that improvements in the position of their sponsors were on the horizon and that there was a reasonable prospect within a period of months that they would be able to satisfy the requirements of the rules. That afforded weak support for a claim for a grant of leave to enter outside the rules. The secretary of state is entitled to enforce the rules in the usual way.

19. Mr Whitwell submitted that with regard to length of residence, the Judge had dismissed the claim under paragraph 276 ADE. The claimant had not been here for 20 years. Nor were there significant obstacles to his returning to Nigeria. Accordingly, 14 years do not on their own constitute a basis for rendering the decision disproportionate.

20. Since he has become an adult, the claimant has taken no steps to regularise his position.

21. He can be described as having “good character” as the Judge did in paragraph 29 (“immaculate character”). Taken as a whole, then, it cannot be said that this contributed towards tipping the balance in his favour.

22. Mr Whitwell also submitted that the Judge failed to apply the public interest factors particularised in s.117B of the 2006 Act. There was nothing to show that the Judge gave little weight to his finding that the claimant's presence has always been precarious. Although the grounds in support of the application for permission contend that his stay in the UK has always been unlawful for the purposes of s.117B(4)(a), that would not make any significant difference to the approach required.

23. The claimant was only basing a claim on his private life. There was little evidence of his circumstances. At [31] no reasons were given as to why he would not be a burden on the taxpayer. Mr Whitwell referred to the claimant's Barclays bank account (42-47). This contained a summary of his account between July and August 2009 and between 1 January 2011 to 2 February 2011. It is evident from those statements that the claimant might have funded himself through his education but the Judge has given no reasons and it would not be appropriate to “glean” from the determination that that was in the Judge's mind when making the finding.

24. There was accordingly no evidence of financial independence justifying a finding that he would not in the future be a burden on public funds, contrary to s.117B(3).

25. There are other grounds Mr Whitwell relied on, including the contention that the Judge failed to take proper account of the public interest factor as particularised in s.117B(1), either explicitly or implicitly. The importance of maintaining immigration control although referred to was not taken into account or given any weight in the proportionality exercise.

26. On behalf of the claimant, Mr Karim submitted that the Judge had given a full and detailed determination with adequate reasoning. He noted that counsel had applied for an adjournment before Judge Symes as the claimant was no longer in a relationship with the partner which had formed the basis of the initial application. He was however in a new relationship with a French national who could not come to court on the date of the hearing. Judge Symes refused the adjournment application as there was no evidence as to the existence of that new relationship indicating that it was too insubstantial to form part of EEA or Article 8 rights.

27. The Judge had also heard oral evidence including from the claimant. The secretary of state had been unrepresented. The Judge had taken account of the Surendran guidelines. There had been no challenge to the claimant's evidence in the refusal letter. It was generally consistent with the documents available. He accepted that the claimant was a witness of truth and he accepted the historical facts set out in establishing the foundation upon which the appeal should be determined [19].

28. The Judge took into account authorities such as Nagre and Aliyu [2014] EWCA Civ 3319 and the Court of Appeal decision in MM and Others [2014] EWCA Civ 985.

29. The Judge also bore in mind the general immigration policy represented in the rules insofar as they provide for the regular migration of individuals to the UK and make express provision for long term residence in limited situations, such as where a person has lived here for a specified period of his life [24]. That is an example of having regard to immigration policy.

30. The Judge at [26] had regard to a case where there is no criminality and where there is less of a public interest in removal. On the other hand the Judge expressly noted that the claimant had always been here “precariously.” The Judge has accordingly taken into account the provisions of s.117B(4) and (5).

31. it was further submitted that Judge Symes had full regard to the claimant's immigration history in the context of deciding whether the serious interference with private life is proportionate. He had regard to the impact of that interference. It would be to take him from the society where he had numerous friends and a girlfriend who resides here for much of the time and where he has studied with success. He has a real prospect of employment in the financial services industry or elsewhere. If returned he would be placed in a country where he has not lived for half his life and

where he last resided as a youthful adolescent. He does not have any current connections there [27].

32. At paragraph 28, the Judge again acknowledged the importance of maintaining immigration control which means having a clear and consistent system of rules by which foreign students are regulated.

33. Mr Karim noted that the Judge also had regard to the test under Article 8, which is whether his removal would be unjustifiably harsh, which was a "higher test" than paragraph 276.

34. The Judge was aware [24] that a free standing Article 8 consideration was justified only where there were exceptional circumstances producing unjustifiably harsh consequences so as to outweigh the public interest, albeit having regard to the principles of proportionality [24].

35. Mr Karim submitted that the argument that the Judge attached undue weight to the claimant's good character was misconceived. The issue of weight is a matter for the Judge.

36. Nor could the Judge have only referred to the fact that the claimant had a good immigration history. It also means that the claimant has not committed any criminal offences or committed deception. Hence his reliance and reference to Uner v Netherlands was appropriate. The Judge expressly stated that this is a case where there is no criminality which means there is less of a public interest in his removal.

37. Mr Karim submitted that the Judge did not "arguably focus upon a near miss argument" as contended in ground 1(c) of the permission application. He expressly stated that a "near miss is as good as a mile in human rights terms." However, he properly identified the context in which it might be relevant, namely when considering the proportionality of a proposed interference with Article 8 rights.

38. Mr Karim referred to and relied on Patel v SSHD [2013] UKSC 72, at [55 - 56] where Lord Carnwath, although rejecting the concept of a near miss principle in earlier cases, stated that the practical or compassionate considerations which underlay the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent, may add weight to their argument for exceptional treatment. There was no presumption or expectation that the policy would be extended to embrace them.

39. He also referred to SSHD v SS (Congo), *supra*, at paragraph 56 where the Court of Appeal stated that it cannot be said that the fact that a case involves a "near miss" in relation to the requirements set out in the Rules is wholly irrelevant to the balancing exercise required under Article 8. If an applicant can show that there are individual interests at stake covered by Article 8 which give rise to a strong claim that compelling circumstances may exist to justify the grant of leave to enter outside the rules, the fact

that the case is also a “near miss” case may be a relevant consideration which tips the balance under Article 8 in their favour.

40. In such a case the applicant will be able to say that the detrimental impact on the public interest in issue if leave to enter is granted in their favour will be somewhat less than in a case where the gap between the applicant's position and the requirements of the rules is great, and the risk that they may end up having recourse to public funds and resources is therefore greater.

41. Accordingly, he submitted that it would be an injustice to characterise Judge Symes' determination as falling foul of the “near miss” rule.

42. With regard to the assertion that the s.117B factors had not been properly considered, he submitted that Judge Symes had had proper regard to them at [30]. He set out the whole of the section. He reminded himself of the need to take account of statutory factors which were relevant. Accordingly, this was at the forefront of the decision making process.

43. He also referred to Dube (ss. 117A-117D) [2015] UKUT 00090 (IAC). Judges are required to take into account a number of enumerated considerations. The sections 117A-D are not an *a la carte* menu of considerations. Judges are duty bound to “have regard” to the specified considerations.

44. The Tribunal also stated that it is not an error of law to fail to refer to s.117A-D considerations if the Judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form.

45. Mr Karim submitted that the Judge has expressly referred to this and has taken the sections into account. Paragraph 31 of the determination constitutes a summary which represents a “culmination of his findings.”

46. Mr Karim also referred to Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC). Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge.

47. Although the decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

48. Judge Symes has set these out. The claimant's background, including his education and residence here, as well as his realistic prospects that he will

not be a burden on taxpayers, has been dealt with. There was no evidence that he has been a burden on the public purse.

49. Mr Karim accordingly submitted that the claimant's grounds constitute a disagreement with the proportionality findings. There was moreover nothing irrational or perverse in those findings.

Assessment

50. Judge Symes has appropriately directed himself in accordance with relevant authorities such as Nagre and MM and others to which I have referred.

51. He has had regard to the length of the claimant's residence in the UK, which was over 13 years. He has lived here for almost half his life. If he had made his application before 9 July 2012, it is expected that he would have been granted settlement. However, he was no longer able to meet the requirements under paragraph 276. There was also a further basis in which he might have had a strong application as a child of relatives present and settled here.

52. Judge Symes recognised that a "near miss is as good as a mile". He nevertheless had regard to Lord Carnwath's statement that the balance drawn by the rules may be relevant to the consideration of proportionality.

53. He had regard to SS (Congo), *supra*, that the fact that a case involves a "near miss" in relation to the requirements set out in the rules is not wholly irrelevant to the balancing exercise under Article 8. Where he has a strong claim that compelling circumstances may exist to justify the grant of leave outside the rules, the fact that the case is also a near miss case may be a relevant consideration tipping the balance under Article 8 in his favour.

54. That is because the detrimental impact on the public interest in issue if leave is granted in his favour will be somewhat less than in a case where there is a great gap between his position and the requirements of the rules. That is because the risk that he may end up having recourse to public funds and resources is therefore greater.

55. Judge Symes has appropriately directed himself in accordance with the relevant s.117B public interest considerations.

56. He was also aware of and thus took into account the fact that his Article 8 rights have been built on a stay which is precarious. However, that was mitigated by the fact that this was as a result of decisions made by adult relatives for which he cannot be held responsible.

57. In this case, he was already well established in education at the time that he reached majority. He found that he would not be a burden on the taxpayer and spoke good English. That was a finding based on the

evidence. There was thus no suggestion that the claimant had ever availed himself of public benefits.

58. The Judge had regard to the effects of removing him. That would significantly interfere with his private life. It would take him from a society in which he had numerous friends as well as a girlfriend who resides here much of the time. He had a real prospect of employment here in the financial services industry. To place him in a country where he has not lived for half his life and where he last resided only as a youthful adolescent, with no extant connections, would be a significant interference.

59. Although the reasons for the findings might have been more fully set out, I find that the Judge has given proper reasons for the conclusions on the central issue. I find that the decision as a whole does make sense, having regard to the evidence and facts accepted by the Judge on a cumulative basis.

60. Nor is this a case where the conclusions that he drew from the evidence available were not reasonably open to him. It might be that another Judge would have come to a different conclusion. However, I am satisfied that the decision of Judge Symes has not been shown to have been materially flawed in any way. Nor is it irrational or perverse in any way.

Notice of Decision

The decision of the First-tier Tribunal Judge did not involve the making of any material error of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed Date 25/7/2015

Deputy Upper Tribunal Judge Mailer