Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27725/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14 December 2015	**On 22 January 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O B

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Home Office Presenting Officer
For the Respondent: Mr R. Amarasingha, Counsel instructed by Mordi & Co.

DECISION AND REASONS

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

Background

2. The appellant entered the UK on 01 September 2003 with entry clearance as a student that was valid until 30 June 2004. She was subsequently

granted further periods of leave to remain as a student until 31 October 2009. In May 2006 she met her husband, [MH], and they started a relationship. She says that they moved in together in February 2007. The appellant says that she suffered physical and psychological abuse from her partner. Despite her doubts she went ahead with their wedding on 13 September 2008. The abuse continued after their marriage and the appellant recounts various incidents, some of which involved the police. Her husband refused to support an application for leave to remain as a spouse. The relationship finally broke down in May 2009. The appellant was pregnant at the time but sadly miscarried in August 2009.

3. On 08 October 2009 she applied for Indefinite Leave to Remain as the victim of domestic violence but the application was refused on 22 October 2009. The appellant made further applications for leave to remain outside the immigration rules on 18 November 2010 (refused 20 December 2010) and 29 September 2012 (refused 12 November 2013). On 23 May 2014 she applied once again for Indefinite Leave to Remain as the victim of domestic violence. The application was refused in a decision dated 11 June 2014.

4. First-tier Tribunal Judge Napthine ("the judge") allowed the appeal in a decision promulgated on 26 June 2015. The judge found the appellant and her sister to be credible witnesses and accepted her account of events, which was consistent with the evidence produced in support of the appeal. He took into account the fact that the domestic violence provisions were supposed to address exactly the type of situation that the appellant had found herself in. The only reason why she did not obtain leave to remain on the grounds of her marriage was because her husband refused to support an application. It formed part of the abuse [30]. The judge found that after the breakdown of her marriage the appellant formed a particularly close and supportive relationship with her sister, who provided her with practical and emotional support. In turn the appellant also plays an active role in her sister's family [32]. The judge set out aspects of the law relevant to the proper assessment of Article 8 of the European Convention, including the statutory provisions relating to "public interest considerations" contained in section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") [34-39].

5. The judge went on to consider the appellant's length of residence, the ties she has established in the UK and the nature of her relationship with her sister. He concluded that the nature of her relationship with her sister was such that it had additional elements of dependency over and above those normally found between adult siblings and therefore constituted family life. The judge concluded that there would be a sufficiently grave interference with the appellant's right to private and family life as to engage the operation of Article 8 [41-47]. The judge's findings relating to the proportionality of removal were as follows:

> "48. I find these are all matters to be placed into the balance when assessing whether the SSHD was correct in finding the Appellant's family and private life was not deserving of respect to the extent that her removal

would be an excessive and unreasonable act. For the reasons set out above, I find that the removal of the Appellant would be an unwarranted interference with her Article 8 rights to respect for her family and private life.

49. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of cases (Razgar [2004] UKHL 27). I have weighed all the competing considerations and given due and considerable weight to the considerations in favour of the decision appealed against and I find the decision of the SSHD was an excessive and unwarranted interference with the Appellant's right to respect for her family and private life.

50. In the light of the facts as established there are substantial grounds for believing that the Appellant would be subjected to a flagrant disregard of her human rights under Article 8 if returned to Nigeria."

6. The respondent seeks to challenge the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal erred in taking into account the fact that the appellant's husband did not support an application for leave to remain as a spouse. The requirement to have leave to remain as a spouse was an eligibility requirement under paragraph E-DVILR of the immigration rules.

   (ii) The First-tier Tribunal erred in failing to make any findings relating to the public interest considerations outlined in section 117B of the NIAA 2002.

Decision and reasons

Findings relating to error of law

7. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.

8. I find that the fact that the judge took into account the appellant's history of domestic violence, and in particular the fact that part of that abuse involved her husband refusing to support an application for leave to remain as a spouse, does not amount to an error of law. It simply formed part of judge's findings of fact in relation to the claim. It is clear from the decision that the judge understood that the appellant did not meet the requirements of paragraph E-DVILR of Appendix FM [36]. The appellant did not put forward her case on that basis and the whole appeal was considered under Article 8 of the European Convention of Human Rights outside the immigration rules. As part of his overall assessment of the factual circumstances in this case it was open to the judge to take into account the reason why the appellant was unable to apply for leave to remain under the immigration rules relating to domestic violence, which he concluded was as a result of the same domestic abuse that may have founded such an application.

9. The second ground of appeal has more force. The judge directed himself correctly to the fact that he had to take into account the public interest provisions contained in section 117B of the NIAA 2002. He quoted the provision [38]. His finding that the appellant had established a relationship of sufficient closeness and dependency with her sister has not been challenged. Nor has his finding that removal in consequence of the decision would amount to an interference with her right to private and family life under Article 8(1) [41-47].

10. The focus of the respondent's appeal relates to the proportionality assessment carried out by the judge in the paragraphs quoted above [5]. While many of the factors that he was required to consider under section 117B were apparent on the facts of the case the Tribunal in *Dube (ss.117A-D)* [2015] UKUT 00090 made clear that it is incumbent on a judge to deal with those matters in substance. In this case the judge quoted section 117B but did not undertake an evaluative assessment of each of the relevant public interest factors when conducting the balancing exercise under Article 8(2). The First-tier Tribunal's failure to undertake that exercise amounts to an error of law.

Remaking the decision

11. There is no challenge to the First-tier Tribunal's findings of fact. The judge heard and evaluated the evidence given by the witnesses. He considered the documentary evidence relating to the extent and nature of the domestic violence suffered by the appellant, and as a result of those experiences, he accepted that the appellant had forged closer ties with her sister and her family than one might normally expect between adult siblings. Those findings were open to him on the evidence. For this reason I am satisfied that the findings of fact made by the First-tier Tribunal can be preserved.

12. The appellant does not meet the requirements of E-DVILR of Appendix FM relating to domestic violence because she did not last have leave as a partner. Indeed, at the date of the current application she had no leave to remain. The appellant's familial relationship with her sister does not engage any of the family life categories contained in Appendix FM of the immigration rules. The appellant does not meet the private life requirements contained in paragraph 276ADE(1) of the immigration rules because she has not lived in the UK for the required length of time and it is not argued that there are "very significant obstacles" to her reintegration in Nigeria. For these reasons the appellant does not meet the strict requirements of the immigration rules.

13. The immigration rules are said to reflect the respondent's view of where a fair balance should be struck between the right to respect for private and family life and public interest considerations relating to the maintenance of an effective system of immigration control (paragraph GEN.1.1 Appendix FM). The rules should be read in a way that reflects a proper interpretation of Article 8 of the European Convention. However, there

may some cases where the rules do not address relevant Article 8 issues. In such cases it may be necessary to consider whether there are compelling circumstances to justify granting leave to remain outside the immigration rules: *Huang v SSHD* [2007] 2 AC 167 & *SSHD v SS (Congo)* [2015] EWCA Civ 387. This should be assessed by reference to the five stage test outlined by the House of Lords in *R v SSHD ex parte Razgar* [2004] 3 WLR 58.

14. The First-tier Tribunal gave sustainable and unchallenged reasons for finding that the appellant has established a private and family life in the UK within the meaning of Article 8 of the European Convention. The judge concluded that her removal in consequence of the decision would interfere with her Article 8 rights in a sufficiently grave way to engage the operation of Article 8(1) (questions (i) & (ii) of Lord Bingham's five stage approach in *Razgar*).

15. Article 8 of the European Convention protects the right to family and private life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

16. In assessing whether removal in consequence of the decision would be a proportionate response I am required to take into account the public interest considerations set out in section 117B of the NIAA 2002. I take into account the fact that significant weight should be given to the public interest in maintaining an effective system of immigration control (s.117B(1)). The appellant does not meet the requirements of the immigration rules and in such circumstances she would normally be expected to leave the UK.

17. It is reasonable to infer from the fact that the appellant studied at degree level, and gave evidence without the assistance of the interpreter, that she speaks English. She is therefore better able to integrate in the UK. However, this is a neutral factor that does not add to her case in any significant way (s.117B(2)). It is merely a factor that does not lend additional weight to the public interest considerations: see *AM (S.117B) Malawi* [2015] UKUT 260. The evidence before the First-tier Tribunal was that the appellant is financially dependent on her sister. There is no suggestion that she is a burden on the taxpayer, and if permitted to work, there is no reason why should not be financially independent given the fact that she has degree level qualifications (s.117B(3)). Nevertheless, this is also a neutral factor.

18. The family life considerations contained in section 117B(4) have no bearing because they only relate to family life with a 'qualifying partner'

and do not engage the particular family life considerations that arise in this case.

19. The appellant has lived in the UK for a period of 12 years. She had limited leave to remain as a student until 2009 and as such could have no expectation of long term settlement. Although she married a British citizen, which in time might have led to settlement, her husband refused to support an application for leave to remain as a spouse. The First-tier Tribunal found that this controlling behaviour formed part of the overall domestic abuse that the appellant suffered within the marriage. Since her visa expired in 2009 the appellant made several applications for leave to remain in an attempt to regularise her immigration status. In these circumstances I find that she established her private life in the UK at a time when it could not be said that her immigration status was anything other than "precarious" within the meaning of section 117B(5). As such any private life that she formed in the UK must be given little weight.

20. The appellant does not have children in the UK. Although she is close to her sister's children there is no suggestion that she has a parental relationship with them or that they would be forced to leave the UK if she returned to Nigeria. As such section 117B(6) does not appear to be a relevant public interest consideration on the facts of this case.

21. If the appellant entered and remained in the UK as a student and her marriage had broken down due to some other reason it is unlikely that her circumstances would be sufficiently compelling to outweigh the public interest considerations outlined above. However, the First-tier Tribunal heard evidence from the appellant and her sister. The judge took into account the nature of the abusive marriage and the fact that the only reason why she had been unable to meet the requirements of the immigration rules was because of the very nature of her husband's controlling and abusive behaviour. He took into account the public policy considerations that underpin the provisions for leave to remain on the grounds of domestic violence, which are broadly speaking to enable a non-British spouse or partner to leave an abusive marriage without fear of losing her immigration status in the UK. In assessing whether the circumstances were sufficiently compelling the judge was entitled to take into account the fact that, if her husband had supported an application for leave to remain as a spouse, she would in all likelihood have been on a route to settlement, either as a spouse, or when the marriage broke down, would have met the requirements of the immigration rules relating to domestic violence. In other words, 'but for' the domestic violence that underpins the intended purpose of that part of the rules the appellant wouldn't have been left in such a precarious position in terms of her immigration status.

22. I find that it was also open to the judge to consider how the appellant's history of domestic abuse had strengthened and deepened her relationship with her sister. Her sister provided her with much needed emotional and financial support after the breakdown of the marriage and

her subsequent miscarriage. After having heard evidence from both women, who he found to be credible witnesses, the judge was satisfied that their familial relationship now had the additional elements of dependency required to engage the operation of Article 8.

23. Although I was compelled to find that the decision of the First-tier Tribunal involved the making of an error of law because the public interest considerations contained in section 117B of the NIAA 2002 were not adequately addressed it is quite clear that the judge came to his conclusions about the compelling nature of the circumstances in this case with full awareness of the appellant's immigration history [4-7]. It is clear from his findings in paragraph 49 of the decision that he was aware of the correct test to be applied in assessing the proportionality of removal because he noted that in the vast majority of cases removal in consequence of the lawful operation of immigration control would be proportionate "in all save a small minority of cases". This is consistent with the principles outlined by the House of Lords in *Huang* and *Razgar* as well as the Court of Appeal decision in *SS (Congo)*.

24. No successful challenge has been mounted to the First-tier Tribunal's reasoning or the judge's conclusion that compelling circumstances are disclosed on the particular facts of this case [43]. Another Tribunal may have come to a different conclusion but the judge's findings were supported by evidence and could not be described as irrational or perverse. I have gone on to make an assessment of the public interest considerations contained in section 117B of the NIAA 2002 and conclude that, although little weight can be placed on the appellant's private life, the particular set of circumstances identified by the First-tier Tribunal are sufficiently compelling to still outweigh the public interest in maintaining an effective system of immigration control. The case involves a close and dependent family life situation that is not covered by the immigration rules, which arises from a history of compelling and compassionate circumstances. In other words, I come to the same overall conclusion after having evaluated the public interest considerations that were lacking in the First-tier Tribunal decision.

25. For the reasons given above I find that removal in consequence of the decision would amount to a disproportionate interference with the appellant's right to private and family life under Article 8 of the European Convention (questions (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I re-make the decision and ALLOW the appeal

Signed  Date 21 January 2016

Upper Tribunal Judge Canavan