IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41372/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th February 2016	**On 6th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TOM PETER IYARE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms Sreeraman, Home Office Presenting Officer
For the Respondent: Mr Uzdechima, instructed by Patterson & Co, Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal. In this instance the Secretary of State appeals with permission against the decision promulgated on 24th August

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2015 by Judge Seifert who allowed the appellant's appeal on Article 8 grounds against the respondent's decision to refuse to grant him leave to remain and to remove him to Nigeria as an overstayer by reference to Section 10.

2. The appellant is a citizen of Nigeria born on 10th September 1993 and he entered the United Kingdom on 22nd December 2006, as a minor, and with his family as a visitor, with leave valid only from 17th May 2006 to 17th May 2008.

3. On 25th September 2012 the appellant was included as a dependant in his mother's EEA residence card non-EEA national's application. That application was refused on 26th February 2013 and he was served with a form IS151A notifying him on 18th August 2014 of his immigration status and liability to detention and removal.

4. On 25th September 2014 a decision which is the subject of this appeal was made to refuse the application for leave to remain on the ground that the decision would not place the UK in breach of its obligations under the Human Rights Act and gave directions under Section 10 of the Immigration and Asylum Act 1999 for the appellant's removal.

5. The appellant's solicitors submitted that the appellant had overstayed because it was the fault of his parents and because their relationship had broken down and he had resided in the UK for eight years, was of good character with no criminal convictions nor recourse to public funds and was currently studying at university and had no connection with Nigeria as his family unit remained in the UK.

6. The respondent made an application for permission to appeal pointing out that one of the findings at paragraph 26 of the First-tier Tribunal's decision was that the appeal of the appellant's mother and three younger siblings was allowed in a decision with reasons promulgated on 27th January 2015. It was recorded *"Mrs Iyare confirmed that leave was granted to her and Mr Iyare's three younger siblings who are between 8 and 15 years of age. Together with Mr Irye, they are a family unit. She confirmed that Mr Iyre has been in the UK since 22nd December 2006. "*

7. It was submitted on application for permission that the judge had been misinformed on this point and this had led to a material error in law. Mrs Iyare and her three children had not been granted leave after the Secretary of State was successful in challenging the decision and had been granted permission to appeal the decision on 27th January 2015. There was to be an Upper Tribunal hearing on 3rd September 2015.

8. At paragraph 46 the judge found that the appellant would face significant obstacles to integration into Nigeria "having no home, no relatives and a different accent than others. He would not be able to complete his current university course."

9. It was further submitted that the appellant would not be able to complete his university course but the judge had erred by not taking into consideration the case law of **Nasim and Others Article 8 [2014] UKUT 0025** and **Patel and Others and The Secretary of State for the Home Department [2013] UKSC 72** which confirmed at paragraph 57

> "*57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in Pankina for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8*."

10. It was submitted that the obstacles given to integration into Nigeria were not "very significant" the appellant spoke English and indeed English was the official language of Nigeria. The appellant had the advantage of an English education and there was a reintegration package that the appellant could access.

11. Permission to appeal was granted stating that the judge was shown a decision of Judge O'Garro allowing the mother's appeal but not told the respondent had been granted permission to appeal. The decision also displayed a failure to engage with the proper approach to paragraph 276ADE **SS Congo v SSHD [2015] EWCA Civ 317** and to an Article 8 appeal outside the Immigration Rules. Had the judge known the true position of the appellant's mother and children he would not have reached the conclusion that the appellant would be returning to Nigeria alone and without family support. The judge failed to ask himself how the appellant gained admission to a university degree course without having leave to remain and why he should be allowed to conclude that course when he did not meet the requirements of the Immigration Rules as a student.

12. In addition it was arguable that the judge failed to apply Sections 117A to D and the guidance to be found in **AM Malawi**. Overall there was a flawed approach.

13. A Rule 24 reply was submitted by Mr Iyare's solicitors on the basis that no issue was taken in the submission by the respondent regarding the mother's status. The relevant date is the date of the hearing and the Tribunal should decide a case based on the current evidence at the date of the hearing. Removing the appellant jointly with his family members was

not part of the respondent's reasons for refusal letter and not before the First-tier Tribunal Judge and the respondent's submissions with regard the judge's finding on an obstacle of reintegration was simply a disagreement.

14. The appeal was allowed under paragraph 276ADE(1)(6) and family members' immigration status or relationship was immaterial to the application of sub-paragraph (6) of the Rule and such consideration was irrelevant to the satisfaction of that Rule as the Rule was individualistic. The judge made clear at paragraph 48 that Appendix FM was not satisfied. The perceived error and reference to the First-tier Tribunal Judge's finding at 26 was misconceived in that such a finding related to family life outside the Rules as made clear.

15. The respondent's challenge to the First-tier Tribunal's finding of fact on the university education was again misconceived the judge was making a finding of fact under the Rule not under Article 8.

16. The judge accepted that the appellant remained in the UK as a child and it was not the appellant's choice or fault [paragraphs 27 and 34] and therefore the judge was right to take into account at [46] that the appellant's education would suffer.

17. The appellant would face destitution. There was no subsisting relationship with the father or anyone in the country. He could not speak the local language or 'Pidgin' English. He spoke English with a foreign language. The judge considered all of the evidence. It was not open to the Secretary of State to introduce new evidence.

18. The respondent's position during the application was to the effect that the appellant was an independent adult therefore separated from his mother and siblings' application. It was unarguable the appellant cannot meet the requirement of the Rules simply because the respondent is proposing after the hearing to remove him with his mother and siblings as a family. This argument was perverse.

19. The case of **AM (S 117B) Malawi** [2015] UKUT 0260 (IAC) was not specifically raised in the respondent's grounds and the judge properly directed his mind to the relevant part of the law Section 117B. It was submitted that **AM Malawi** (*The statutory duty to consider the matters set out in s 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant)* at paragraph 8 proved the judge's approach.

The Hearing

20. At the hearing Ms Sreeraman submitted the judge had misdirected himself under paragraph 276ADE. The court had been misinformed by the mother that she had been granted leave. That was clear from the fact that the mother had not been granted leave as the Secretary of State had

challenged the decision allowing her appeal and the Secretary of State had been granted permission on 23rd March 2015.

21. Mr Uzdechima on behalf of the appellant confirmed that the mother was at the hearing and the judge was entitled to presume that she had settled in the UK because her appeal was allowed. The hearing was held on 3rd July 2015.

22. He referred to a skeleton argument which he submitted at the hearing. He confirmed that the Secretary of State was not represented at the hearing before the First-tier Tribunal but he stated that the date of the hearing was relevant and this could be seen from the decision of **J1 v SSHD [2013] EWCA Civ 279**. I was referred to paragraph 55 which stated that at (i) in cases where the Claimant seeks asylum or a right to remain in the UK on human rights grounds the court or Tribunal must determine that claim on the basis of current evidence. He submitted that at the date of the hearing the mother was not removable. Indeed he stated that there had been an Upper Tribunal hearing but the mother's appeal although dismissed by the Upper Tribunal had been granted permission to appeal to the Court of Appeal. Notwithstanding that, this was an individual claim by the appellant. It was not that the Secretary of State was stating he should be removed together with his mother and family and the judge had made that clear. This appeal was not granted under Appendix FM but the judge had made findings that the appellant had nowhere to go and no home to go to and that he would be destitute as he had no relations with anyone in Nigeria. He would not have anyone to pick him up at the airport and he was currently in education here.

23. The judge had even stated that if he was wrong about his findings under the Immigration Rules the appeal should be allowed under Article 8.

24. Ms Sreeraman submitted that the mother had never been granted leave and that the judge had not fully considered Section 117A to D of the Nationality, Immigration and Asylum Act particularly with regard to **AM Malawi**. There had been no conferring of lawful status on the mother and the fact was that the appeal had been conducted in the wrong factual matrix.

Conclusions

25. The Secretary of State in her reasons for refusal dated 25th September 2014 has set out the considerations of the appellant's private life and as a factor in an assessment of the private life referred to the appellant's family members in the UK and that it was not demonstrated that those relationships constituted anything more than normal emotional ties.

26. In the decision Judge Seifert found at paragraph 45 that those relationship ties went beyond normal emotional ties and amounted to an ongoing family life. He found that the appellant did not live an independent family life and had only stayed away during the university

term intending to return to the family home when his course was completed.

27. The judge also found at paragraph 46 that the appellant had established a private life in the UK. As part of that private life the judge factored in the previous paragraphs (in relation to the finding of the relationship with the family) and found that the appellant, if he returned to Nigeria, would face significant obstacles having no home and no relatives and a different accent than others. The judge also added he would not be able to complete his current university course. The judge proceeded to allow the appeal under paragraph 276ADE having considered whether there would be significant obstacles to his return. One of the factors under that consideration must be the appellant's ties in the UK as well as ties in Nigeria. The judge at paragraph 45 found that the appellant was not independent from his mother and family and a significant factor in the deliberations was therefore legal immigration status of the appellant's mother and family. Even if I were to agree with Mr Uzdechima that the relevant date for consideration of the facts in relation to human rights was the date of the hearing the mother and family had *not* been granted leave to remain.

28. It was submitted before the First-tier Tribunal Judge that there had been a decision promulgated on 27th January 2015 allowing the appellant's mother and younger siblings to remain in the UK. It was recorded "Mrs Iyare confirmed that leave was granted to her and Mr Iyare's three younger siblings who are between 8 to 15 years of age. Together with Mr Iyare they are a family unit."

29. The judge took that to mean that "they have leave to remain" [40].

30. There are two difficulties with that. The first is that Mr Uzdechima confirmed before me that he acted for both the appellant and his mother and family, that that on 23rd March 2015, and *prior* to the hearing in Mr Iyare's appeal, permission to appeal been granted against the decision allowing the mother's appeal. Secondly, even if that appeal was allowed that did not confirm that the appellant's mother and family had leave to remain as the judge found. Indeed Mr Uzdechima agreed that their status as at the date of hearing on 3rd July 2015 before Judge Seifert was that they would not be required to leave rather than they would be granted leave to remain.

31. **FP Iran v SSHD** [2007] EWCA Civ12 confirms that new evidence can, in certain circumstances, be relied upon to establish an error of fact amounting to an error of law. Following the guidance in **E and The Secretary of State for the Home Department [2004] EWCA Civ 42,** I find there was a mistake in this case as to existing fact – that being the mother's and family's status, which was capable of being objectively verifiable, the Secretary of State was not responsible for the mistake, (unfortunately the Secretary of State was not represented at the hearing)

and the mistake for the reasons given above did play a material (it does not need to be decisive) part in the Tribunal's reasoning.

32. It is not clear whether the judge proceeded to allow the appeal under Article 8 because he only recorded that the appeal was allowed under the Immigration Rules. That said the judge having failed to have the correct information in relation to the mother's and family's status stated at paragraph 49

> "*Although he did not have immigration status to remain he explained that his circumstances at that time were that he regarded himself as part of the family unit of his mother, her EEA partner and his siblings. Although I have taken into account that little weight be attributed to private life established when immigration status is precarious this does not require no weight to be given to the private and family life established in this case.*"

33. The judge did not have correct information in relation to the immigration status of the family and it was Ms Sreeraman's case that the mother did not at any time have immigration status. Thus the judge failed, because of the use of a fundamentally flawed factual matrix, to apply correctly Sections 117A to D and the guidance found in **AM Malawi**.

34. I therefore set the decision aside and the matter is remitted to the First-tier Tribunal. It is a matter of regret that the judge was not given the full picture in relation to the immigration status of the mother and I direct that the Secretary of State should serve evidence on both the Tribunal and the appellant's representatives regarding the immigration status of the appellant's family.

35. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

No anonymity direction is made.

Signed Date 24th March 2016

Deputy Upper Tribunal Judge Rimington