IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43720/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2016	**On 24 March 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

GILBERT GANGMBERG AWAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, Direct Access Barrister
For the Respondent: Miss A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant challenges the decision of First-tier Tribunal Judge Clarke promulgated on 13 July 2015 ("the Decision"). By the Decision the Judge dismissed

the Appellant's appeal against the Respondent's decision dated 27 October 2014 refusing him further leave to remain in the UK outside the Immigration Rules and directing his removal to Cameroon.

2. Permission to appeal was granted by Deputy Upper Tribunal Judge Mailer on the basis that the Judge failed to make a finding or have regard to the fact that the Appellant did not graduate until November 2014 and that "it was crucial that he obtained his results prior to making his application". The Judge considered that this might impact on the Judge's finding that the Appellant was responsible for his own inability to meet the Rules at the time of his application. The Judge also granted permission on the basis that the First-tier Tribunal Judge failed to have regard to Section 117B Nationality, Immigration and Asylum Act 2002 ("section 117B").

3. I deal with the second of those points first. Mr Turner did address me in relation to the proportionality assessment carried out by the Judge to which I will need to return. He did not however pursue the challenge based on Section 117B that the Judge failed to take into account in the Appellant's favour that he spoke English and had no recourse to public funds whilst in the UK. In light of what is said in the case of **AM (Section 117B) Malawi [2015] UKUT 260(IAC)** about those factors, he was right to do so. **AM** makes the point (with which I agree) that those are neutral factors. If they are not present, they may count against an Appellant when weighing the public interest but they are not positive factors against the public interest if they do exist.

4. Section 117B was considered at [35] of the Decision. The Judge properly took into account the fact that the Appellant's situation in the UK was precarious and the fact that the maintenance of effective immigration control is in the public interest. That is relevant to this case not in the sense that the Appellant has remained unlawfully but because it is accepted by the Appellant that he was unable to meet the Rules in the capacity for which he wished to apply at the time of his application.

5. For the foregoing reasons, there is no error of law in relation to the way in which the Judge dealt with Section 117B.

6. Before turning to consider the Judge's assessment of proportionality, it is necessary to consider the Judge's factual findings. That in turn requires a short summary of the facts. The Appellant entered the UK on 7 August 2011 as a Tier 4 Student with leave valid to 30 April 2013. He successfully applied for further leave valid until 30 August 2014. The application which led to the Decision was for ninety days leave to remain outside the Rules to allow the Appellant time to apply for a PhD course. The Respondent refused the application on the basis that she would only grant leave outside the Rules if there were compelling circumstances which did not exist in this case. She also made the point that the Appellant could return to Cameroon and pursue his studies or make applications for further study or employment from there and make a further application for entry clearance as a student or Tier 2 migrant once he had secured a place on a course or employment.

7. I deal first with the Judge's consideration of the Appellant's reasons for not being able to apply in time for the PhD course. Those reasons and whether they amount to compelling circumstances is central to the Appellant's case that he should have been permitted to remain outside the Rules.

8. The way in which the Appellant's case was put before the Judge is recited at [23] of the Decision as follows.

> "He experienced two bereavements which caused him to be late in completing the necessary documentation for admission to his PhD programme. These factors are compassionate circumstances that should have led to the grant of a short period of exceptional leave.
>
> Since his application the Appellant has been the victim of crime in relation to one of his Tier 2 applications resulting in the loss of £3000.00. It is submitted that this would be weighed in the balance when considering the proportionality [of] removing him to Cameroon to make a new Tier 4 application as a PhD student from there."

9. At [10] of the Decision it is also recorded that, although the Appellant says that it was due to grief that he was unable to concentrate on his studies, when he applied to commence his PhD he was told that it would take the London School of Commerce to whom he applied four months to process his application. That being so, even if he had made the application for the PhD course in May in preparation for an in-time application for further leave at a student (if the bereavements had not occurred), it appears he would not have secured sponsorship in time to apply for further leave before his existing leave expired.

10. The Judge dealt with this aspect of the Appellant's case at [27] of the Decision. That paragraph is the central focus of Mr Turner's complaint about the factual findings:

> "The difficulty for the Appellant is that he failed to apply in time to his Tier 4 sponsor to be enrolled on the PhD programme".

(I pause to observe that Mr Turner accepted that this was in fact the case).

> "The Appellant states that as his father died in May 2014 he was unable to concentrate on the pursuit of his studies and prepare his application in time. However the Appellant knew that his MBA course was coming to a conclusion in the spring of 2014. I find that Mr Awah must have given some consideration to his future and whether that involved further academic studies or employment after completion of his MBA. It is not likely that Mr Awah only thought about his future career after the death of his father in May 2014 or that he suddenly realised that he needed to submit an application if he were to undertake further academic studies. I find therefore that Mr Awah simply failed to make his application for enrolment on the PhD in time. This failure was due to tardiness and a lack of planning and organisation on Mr Awah's part in his final term of his MBA. I do not accept that Mr Amah's failure to lodge an application form with his Tier 4 sponsor in the early part of 2014 can be explained away as a reaction to two deaths that took place after he had completed his MBA. The timing is critical. Mr Awah completed his MBA in March 2014 and, applying the balance of

probabilities, he should have submitted his application for his doctorate programme in his final term or before, not after he had completed the course."

11. The way in which the Appellant's case was put in the grounds of appeal is different. It is said that the Appellant was not in a position to apply for his PhD earlier because in fact he needed to obtain the results from his current course. It is the Judge's failure to make a finding on that which forms part of the grant of permission to appeal. However Mr Turner very fairly accepted that he could not point to anything in the Appellant's evidence which suggests that this was the basis advanced before the First-tier Tribunal Judge. Certainly it does not appear in [23] where Counsel's submissions are recorded. I do not therefore need to deal with that point. The First-tier Tribunal Judge could only deal with the case as put to him and that was not the case put to him either in evidence or in submissions. I should probably record here that Mr Turner was not Counsel in the First-tier Tribunal and I do not therefore intend any criticism of him for not advancing that case if in fact those were Mr Awah's instructions. However, neither can the Judge be criticised for not dealing with a case which was not advanced.

12. In spite of Mr Turner's submissions which at time came perilously close to a mere disagreement with the findings of facts, I am satisfied that the finding at [27] did not amount to an error of law. There was evidence that it was as a direct consequence of the Appellant's failure to apply for the PhD course earlier that he did not obtain sponsorship in time. Had he made that application sooner, he may not have needed to seek leave to remain outside the Rules.

13. Mr Turner also focussed on the Appellant's unfortunate situation in relation to a Tier 2 application which he made in which he became the victim of fraudsters. The Appellant reported this fraud to the police and has complied with the police fraud investigation into the Tier 2 "sponsors" at whose hands he suffered. The Judge noted at [28] of the Decision that the Appellant has indeed been the victim of fraud and that he has reported this to the police and maintained some pressure on the police to do something about this. I have considerable sympathy for the Appellant's plight and it is commendable that he has pursued a complaint to the authorities about these persons. However, that is not the basis on which the Appellant sought to remain in the UK. He did not say that he needed to be here in order to give evidence for a police investigation or anything of that ilk. As such, the Judge was entitled to find that this did not amount to a compelling reason to remain [29].

14. I turn then to consider the Judge's assessment of proportionality under Article 8 ECHR which is dealt with at [31] to [38] of the Decision. Having set out the case law, the Judge noted at [36] that the Appellant sought a period of ninety days to allow him to apply for his PhD. The Judge was clearly aware therefore that the period sought was short. The Judge accepted that Mr Awah might be faced with higher fees as a result of having to return to Cameroon to make an application. However, the Appellant's evidence was that he could afford to pay those fees, albeit that this would stretch his finances.

15. The Judge went on to consider at [37] whether the individual interest of the Appellant was such as to outweigh the public interest in maintaining effective immigration control (which was as I indicate at [4] above relevant on the basis that the Appellant was unable to meet the Rules under which he wished to remain). The Judge noted again the additional cost which the Appellant might incur as a result of having to return to Cameroon. However, having incorporated his finding at [27] that the Appellant was responsible for the predicament in which he found himself, he concluded that "the balance was tipped in favour of the public interest". Many of the points which Mr Turner made in relation to the assessment of proportionality amount in reality to a challenge to the finding at [27]. As I have already found at [12], there is no error of law in the Judge's factual finding at [27] of the Decision. There is similarly no error of law in the Judge's conclusion in relation to proportionality for the same reasons.

Notice of Decision

I am satisfied that the Decision of the First-tier Tribunal does not contain any error of law and I uphold it.

Signed  Dated 10 March 2016

Upper Tribunal Judge Smith