



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/34341/2015

THE IMMIGRATION ACTS

Heard at: Field House
On: 24 November 2017

Decision and Reasons Promulgated
On: 26 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MISS GABRIELLE GABREILOKIWELU
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

DECISION AND REASONS

1. The appellant born on 16 March 1976, a citizen of Nigeria appealed against the decision of the Secretary of State dated 2 May 2015 which was reconsidered on 10 August 2015 to refuse to grant her application for leave to remain in the United Kingdom on the basis of her family life under paragraph 276 ADE of the immigration rules and Article 8 of the European Convention on Human Rights.
2. The appellant's permission to appeal to the Upper Tribunal was at first refused by First-tier Tribunal Judge Parkes on 28 July 2017 and subsequently granted by Upper Tribunal Judge Plimmer on 20 September 2017 stating that it is arguable that the First-tier Tribunal failed to consider whether there are particularly strong features of private life such as length, efforts to regularise status, strong family links and compelling and compassionate factors which may render it inappropriate in Article 8 terms to attach only little weight to the appellant's private life.

First-tier Tribunal's Findings

3. The appellant's application was originally made on 1 February 2014 and refused on 2 May 2014 with no right of appeal. The appellant then commenced judicial review proceedings against the respondent on the basis that the decision of 2 May 2014 had failed to engage with the documentation submitted in support of her application. At the hearing of her judicial review application, Dove J granted the appellant permission to bring those proceedings. This resulted in the respondent issuing a supplementary decision dated 10 August 2015. As a result of this decision the judicial review proceedings were withdrawn by consent on 6 November 2015.
4. The appellant's chronology as to her immigration history is not challenged by the respondent. The appellant first entered the United Kingdom from Ethiopia on 15 August 1997 as a visitor. She returned to Nigeria on 14 September 1997 and then returned to the United Kingdom on 18 July 1998 again as a visitor. On 12 September 1999 she was granted leave to remain as a student which leave was due to expire on 31 October 2000. This was extended on various occasions until 30 November 2003. In the meantime, on 7 February 2003 the appellant's mother was given permission to work in the United Kingdom with a work permit visa valid until February 2006. In June 2008 the appellant applied for dependent status under her mother's visa but was informed that her application could not be considered as she was over the age of 18. On 12 June 2003 the appellant sought permission to remain on discretionary grounds. She submitted a further application of the same bases on 7 November 2003 as her earlier application had not been acknowledged. The appellant continued to chase this application throughout 2004.
5. The appellant's mother left the United Kingdom in September 2005. On 15 February 2006 the appellant's application was refused against which decision she appealed. The appeal was dismissed. The appellant claims that she then sought to appeal the decision further to the higher courts in Scotland but heard nothing further in relation to her appeal.
6. In September 2007 the appellant obtained a work permit visa from victim support and was advised to apply for leave to remain. This application was refused on 7 January 2008 as she did not have valid leave to remain and could not make an in-country application. She at this point became aware that an appeal rights were exhausted. She made a second work permit application in January 2008 this time for a visa to be granted outside the United Kingdom. In March 2008 the appellant sought legal advice from a firm of solicitors. During 2010 and 2011 the appellant made a number of enquiries of her solicitors without success and discovered from the Law Society that

they were under investigation. She was unaware that the respondent was seeking further information about her application which was being dealt with by the legacy team. She found out about this in July 2012. In 2013 the appellant continued in correspondence with the legacy team about her application. She made a separate application for permission to remain in the United Kingdom on the basis of her private life on 3 March 2014 was initially refused on 2 May 2014 and on 3 June 2014 the legacy team also refused the application. There then followed the judicial review proceedings already referred to.

7. In respect of paragraph 276 ADE the first two requirements are not an issue. In order to succeed the appellant must meet one of the remaining requirements in paragraph (iii) to (vi) which provides that the requirements will be met if the applicant is aged 18 years or above, has lived continuously in the UK for less than 20 years.... but there would be very strong obstacles to the applicant's integration into the country to which he or she would have to go if required to leave the United Kingdom.
8. The appellant relies on a number of factors. This includes a period of absence from Nigeria in excess of 20 years, a lack of a nuclear family in Nigeria, her academic studies in the United Kingdom where she has spent her formative adult life, a lack of ties with Nigeria where she spent her undergraduate student years and a close social and community ties in the United Kingdom including those who have looked after her in this country.
9. There is little factual dispute in the case. It is accepted that the appellant is well-qualified having postgraduate legal qualifications. It is accepted that support is available to her in the United Kingdom and that this could continue if she were in Nigeria. It is accepted that the appellant has spent 17 years in the United Kingdom and that she has not been in Nigeria for over 20 years. The appellant's account of activities in the United Kingdom are accepted. It is accepted that she was pursuing applications with the respondent and that she was trying to regularise her position. It is accepted her dealings with various legal advisers. However, the First-tier Tribunal Judge was satisfied that the appellant had realised that her position has always been precarious. She knew that she needed permission to remain in the United Kingdom which he did not have, and she knew when she first entered the United Kingdom that she did so as a student with limited permission to remain. She accepted at paragraph 26 of her witness statement that she received a letter on 7 January 2008 saying that she had no valid leave to remain.
10. It is also accepted that the appellant played a role of an older sister towards her cousins however as she herself says in her witness statement they are now young responsible adults aged 25 and 24. There is insufficient evidence to show that they are dependent upon the appellant to any greater extent that any adult sibling would be on each other.

It is also accepted that the appellant has close family ties with Miss Abbey Coker and her family.

11. However, there is insufficient evidence to suggest that these amount to anything more than the normal social ties between close adult relatives. It is also accepted that the appellant spends time with her cousins and his family including his son aged 11 but these are only occasional visits and whilst it is accepted that the sun would rather have his aunt still living in the United Kingdom, it has not been suggested that they would not still visit each other or keep in touch by other means. It is accepted that the appellant has undertaken voluntary work in the United Kingdom and that she has friends here.
12. It is accepted that the appellant cannot succeed under the immigration rules.
13. In respect of her private life under Article 8, it has been argued on behalf of the appellant that the appellant's circumstances are compelling. The First-tier Tribunal Judge was satisfied that the decision would have an impact on the appellant's family life with her aunt and cousins and also with her private life and therefore Article 8 is engaged. However, it would be in accordance with the law and that is the interference is for a lawful immigration policy it is necessary in a domestic society for the economic well-being of the country.
14. The remaining question is whether the interference is proportionate to the legitimate public end which is sought to be achieved. This involves striking a fair balance between the appellant's rights and those of his or her family on the one hand and the interests of the community at large. The First-tier Tribunal Judge concluded that the interference in that case is proportionate for the following reasons.
15. The reasons given was that the weight that must be attached to the immigration rules which are intended to take into account a person's Article 8 rights and it follows that the failure under the rules is relevant to the proportionality balancing exercise.
16. Section 117B of the act makes it clear that maintenance of effective immigration control is in the public interest. It was accepted that the appellant speaks English and she would be able to work in the United Kingdom. The appellant's immigration status in the United Kingdom has always been precarious. Even though it is accepted that she has taken considerable steps in order to seek to regularise her position however it is also the case that she was aware throughout the process that her position needed to be regularised. She initially entered on student visas and she accepts that in 2008 she was informed that she no longer had any basis for staying in the United Kingdom. It follows that section 117B (5) applies to the appellant. This requires that the weight is to be given to private life established by a person whilst their status is precarious.

17. In the absence of sufficient evidence of the level of dependence between the appellant and her family in the United Kingdom which goes beyond that to be found between close adult relatives the Judge attached little weight to the appellant's family life in the United Kingdom. The Judge took into account that Miss Abbey Coker is willing to continue financial support of the appellant if she returns to Nigeria.
18. The delay in dealing with the appellant's application was not the fault of the respondent but rather appears to have stemmed from failures by the appellant's lawyers to communicate with her. Taking into account all the factors the Judge was satisfied that the interference with the appellant's family and private life was proportionate.

The grounds of appeal

19. The appellant's grounds of appeal state the following which I summarise. The first-tier Tribunal Judge's decision to refuse the appellant's appeal under paragraph 276 ADE of the immigration rules on the basis that they were not very significant obstacles to her return to Nigeria and that her removal from the United Kingdom would be proportionate with regard to the provisions of section 117A and 117B of the 2002 Act is flawed.
20. There has been insufficient consideration of the appellant's rights as protected by Article 8 of the European Convention on human rights and that anxious scrutiny was not given to the appellant circumstances and carrying out a balancing exercise as the proportionality.

Decision on the error of law in remaking the decision

21. Having considered the decision as a whole, I find the Judge's consideration of the appellant's appeal in respect of Article 8 is materially flawed. The First-tier Tribunal Judge in his evaluation of Article 8, said that weight that must be attached to the immigration rules which are intended to take into account a person's Article 8 rights and it follows that the failure under the immigration rules is relevant to the proportionality balancing exercise.
22. I find that the First-tier Tribunal Judge did not make a fact-sensitive assessment of the appellant's circumstances and make his own assessment of proportionality. When considering whether a decision within the law it has been authoritatively established by the higher courts that the test to be applied is not exceptional circumstances or insurmountable obstacles. It is obvious that respect for a family and private life under Article 8(1) is subject to proportionate and justified interferences in the pursuit of a legitimate aim under Article 8(2).

23. In **MM (Lebanon) and others 2014 EWCA Civ 985** it was suggested that where a particular set of the immigration rules are not a complete code, then the issue of proportionality under Article 8 will be more at large. In this respect in **R (on the application of Ganesabalan [2014] EWHC 2712 (Admin))** it was held that unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned because Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision. In **R (on the application of Ganesabalan [2014] EWHC 2712 (Admin))** it was held that (i) Unlike other Rules which have a built-in discretion based on exceptional circumstances, Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned. As the Court of Appeal explained in **MM (Lebanon)** at paragraph 134, " ... if the relevant group of [Immigration Rules] is not ... a 'complete code' then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law". However, the Immigration Rules still remain the important first stage and the focus of Article 8 assessments.
24. In **Meera Muhiadeen Haleemudeen [2014] EWCA Civ 558** Lord Justice Beatson confirmed it is not necessary to find "compelling circumstances" for going outside the Rules. He confirmed that "the passages from the judgments in the cases of **Nagre** and **MF (Nigeria)** appear to give the immigration rules greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights". He did not consider that it is necessary to use the terms "exceptional" or "compelling" to describe the circumstances, and it will suffice if that can be said to be the substance of the Tribunal's decision.
25. The relevant guidance for the purposes of this case is in the IDIs December "Family Members Under the Immigration Rules" (December 2012) at paragraph 3.2.7d headed "Exceptional circumstances" states that 'Exceptional' does not mean 'unusual' or 'unique'. Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1. of Appendix FM have been missed by a small margin. Instead, 'exceptional' means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely. In determining whether there are exceptional circumstances, the decision maker must consider all relevant factors. The guidance describes in mandatory terms a duty to consider all relevant factors in order to make a determination as to whether there are exceptional. The First-tier Tribunal Judge was fixated on the appellant's failure to meet the requirements of the immigration rules without considering all the relevant factors.
26. The First-tier Tribunal Judge failed to appreciate that at the outset of the proportionality exercise, the scales are evenly balanced. The Judge then must identify all material facts and considerations and attribute appropriate and rational weight to

each. In case law it has been held that there is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 - new Rules - correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim.

27. In Mohamed v Secretary of State for the Home Department [2012] EWCA Civ 331, the Court of Appeal pointed out that the phrase "most exceptional compassionate circumstances" had already been subject to judicial unpacking in the case of Senanayake [2005] EWCA Civ 1530. In that case, Lord Justice Chadwick had paraphrased it as meaning circumstances which evoked compassion in the mind of the decision-maker. The Court of Appeal noted, however, that the use of the superlative form stressed how extreme such circumstances had to be in order to qualify.
28. The guidance makes clear that it is describing "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". The First-tier Tribunal Judge did not ask the question whether the respondent's decision would result in unjustifiably harsh consequences for the appellant given her circumstances including the fact that the appellant came to this country as a minor and cannot be held responsible for the actions of her mother.
29. The First-tier Tribunal Judge placed emphasis on sections 117A and 117B which mandate courts and Tribunals that "little weight should be given to a private life established by a person at the time when the person's immigration status is precarious".
30. In Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803, the Court of Appeal examined the interaction of section 117A(2) and section 117C. Sales LJ observed:

"It is possible to conceive of cases falling within section 117B(4) (unlawful presence in the UK) or section 117B(5) (precarious immigration status in the UK) in which private or family life (as appropriate) of an especially strong kind has been established in the host country such that it should be accorded great weight for the purpose of analysis under Article 8 : Jeunesse v Netherlands is a prime example."
31. The Court acknowledged the correctness of the argument that Part 5A "... *had to be construed in such a way as to accommodate this sort of case*". Next, the Court noted that sections 117B(1), (2) and (3) and 117C(1) have the status of Parliamentary statements of public policy which are "*definitive as to that aspect of the public interest*": [49]. Sales LJ continued:

“ But it should be noted that having regard to such considerations does not mandate any particular outcome in an Article 8 balancing exercise: a court or tribunal has to take these considerations into account and give them considerable weight, as is appropriate for a definitive statement by Parliament about a particular aspect of the public interest, but they are in principle capable of being outweighed by other relevant considerations which may make it disproportionate under Article 8 for an individual to be removed from the UK.”

32. It was stated in **Kaur** that the effect of the analysis in paragraph 25 of **Kaur**, considered in tandem with the decision in **Rhuppiah**, is that, through the medium of permissible judicial statutory construction, there is some flexibility in the “*little weight*” legislative instructions contained in section 117B (4) and (5) of the 2002 Act.
33. The First-tier Tribunal in his proportionality assessment failed to consider the legislative demand of “*little weight*” with flexibility. I find that the appellant’s circumstances of which there is no dispute by the respondent, are exceptional and compelling. I find that this is one of the rare cases where the respondent’s interests are outweighed by the appellant circumstances.
34. I therefore set aside the decision of the First-tier Tribunal and remake it, allowing the appellant’s appeal.

DECISION

The appellant’s appeal is allowed.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal

This 24th day of June 2018