Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/05419/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1st May 2019	**On 4th June 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

And

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

JUMOKE RHODA AKINYOKUM

(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria born on 17th May 1973. She appealed with permission against the decision of First-tier Tribunal Judge Buckwell dated 14 June 2018 dismissing her appeal against the respondent's decision of 5 February 2018 to refuse her application dated 8th March 2017 to remain under human rights grounds, particularly paragraph 276ADE (1) of the Immigration Rules and under the ECHR.

2. The First-tier Tribunal judge's decision was considered at a hearing attended by Mr Deller on behalf of the Secretary of State and the appellant in person. It was noted that at paragraph 38 of his decision the First-tier Tribunal judge stated, with respect to the appellant spending twenty years in this country as required by paragraph 276ADE,

> *"Whilst I heard oral evidence from the Appellant I have to take the same view [as the respondent] that in the absence of supporting evidence, particularly documentation, I do not find the burden of proof to have been discharged by the Appellant in establishing continuous residence, albeit unlawfully, for at least 20 years. I do however address this issue further below".*

3. He stated, however, this at paragraph 41:

> *"Although it may be challenging for the Appellant on return to Nigeria, she came at a much younger age to this country without having any support arranged in advance. She did so as a very young adult, at the age of 19 years, and would return as a much mature lady to Nigeria. She still has clear cultural ties with the country, and it would not be unduly harsh or unreasonable to expect her to have to re-establish herself in her country of nationality".*

4. As a result of the conflict in the findings I found an error of law. At the Error of Law hearing, however, Mr Deller submitted that he had found on the file a documentation relating to the 2010 application which would appear to support the appellant's application of long residence. Indeed, there were documents relating to the early part of her residence in the United Kingdom. I observed that it would be unusual for an appellant to risk leaving the United Kingdom only to return but that this of course was not impossible. In the event Mr Deller requested that I held the decision until he could investigate whether the decision of the respondent might be amended/withdrawn/remade. This would be undertaken by 19 November 2018.

5. The matter was, in the event, not resolved. The Secretary of State was instructed to produce evidence on file in relation to the 2010 application made by the appellant regarding her long residence in the United Kingdom.

6. The Secretary of State produced the documentation that was supplied with the 2010 application which included one BT bill from 1994 and one from 1995 (each relating to the same address but with different account numbers), two wage slips from 'Allied Tehnology' (sic) a house agreement dated 15th January 1995, Healthcare Initial wage slips for May, June and November 1996 two wage slips from Profile dated 31st May 1996 and 31st September 1996, a BLM Financial Consultancy Ltd rent receipt dated 2nd March 1998, a Primary Healthcare College Certificate for health care assistant dated 20th May 2001 and an Affinity Health care certificate dated 6th August 2002, a letter from Dr A C Gera dated 22nd December 2010 confirming that the records dated back to December 2001, a letter dated 21st December 20-10 from the Christ Apostolic Church, personal letter from Olubunmi Ayoola dated 13th February 2011, a letter from Teresa Pearce MP dated 8th August 2011, a letter from J Idowu, of AJ Printz dated 24th February 2011, a letter from Pastor Akinola Olukoya of the Mountain of Fire and Miracles Ministries Int'l United Kingdom dated 2nd November 2011, Halifax Bank statements from November 2008, P60, from 2008, passport application payment from the Nigerian Immigration Service dated 12th May 2011, lost properly slip.

7. The remaining documentation post-dated 2001 but include wage slips, electoral and medical documentation spanning 2002 to 2010. Further submissions were also made on that documentation by the Secretary of State.

8. The matter was not re-listed until 2nd May 2019 when it was heard by a Tribunal panel.

9. The appellant claimed that she had first entered the country in 1993, illegally, and she made a long-residency application on 3 August 2010 (based on paragraph 276B – 14 years residence) but that was refused on 28 January 2011.

10. In the current application the appellant did not contend that she had a partner or any other relatives in the UK. The appellant was found by the Secretary of State not to have satisfied the Rules in that she had remained in the country for twenty years or that there were very significant obstacles to her return. The Secretary of State asserted that the appellant had failed to provide any evidence in relation to her claim by

which it was asserted she had resided in the country for at least twenty years. Owing to the production of the evidence from the previous application that was not entirely correct, however, the appellant had been unable to provide sufficient evidence of her period of residence particularly in relation to the claimed early period of residence in this country.

11. It was noted that the appellant had spent the majority of her life in Nigeria and she would not have lost all social and cultural ties to that home country.

12. The appellant was instructed to provide further evidence, but we relied on an appeal bundle pages 1 to 14 which included a witness statement of the appellant dated 11 May, some correspondence and letters of support and medical correspondence.

13. At the First-tier Tribunal hearing the appellant gave oral testimony, in particular she asserted that she had registered with the NHS in 2001 and had, with her human rights application in 2010, provided documentation which had not been returned by the Home Office and she had not retained copies herself. She stated that when she asked about bank statements that she had sent those which she had at the time of her 2010 application to the Home Office but thought she might be able to get further financial papers. In 1998 she had been living with people by way of a favour for her and had attended a church in Peckham and named a pastor but had not invited him to attend and he was not aware that she was attending the hearing. She also said that she had known other people since 1998. She had been paid on a cash basis and lived at various addresses between 1993 and 1999. She stated that she entered the UK at the age of 19 in February 1993 and a friend had assisted her to leave Nigeria. As a consequence of her miscarriage in 2006 her partner had left her, and she had a troubled mental state. She would not be able to return to Nigeria because she had no living relatives and would have no income. In 2011 she had been expecting twins and her babies did not survive. Her husband left her. Her parents had both been killed in a car accident in Nigeria and her brother was given to a stepmother, but she has not seen him since the age of 17. She also contradicted herself by stating that she had come to the country with the help of a stranger.

14. For the resumed hearing on 2nd May 2019, the Secretary of State produced a bundle of evidence with submissions. The evidence was documentation supplied by the appellant with her 2010 application.

15. At the resumed hearing, Mr Melvin questioned the appellant. She had no live witnesses. She was asked how the BT bills dating from 1995 had an 0207 prefix which was not introduced until 2000 and she replied that she did not know. She had been sent these bills by someone living at the house. She was also asked about the wage slips dating from Allied Tehnology dating from 1994. The two wage slips dating from June and September both cited ‘wk 22’. The appellant did not know but thought there may have been an error in production or photocopying. She confirmed that she did not have evidence from HMRC to show she was working in March or June 1994 saying that it was a long time ago. She had not approached HMRC because she was scared. Although asked about previous legal representation she stated that latterly she had represented herself. She stated that she did not ask the solicitors to approach HMRC. She thought Healthcare Initial were based in Stockwell and she could not remember when Allied Technology closed down. She had no NI number because she could not work. She did not know how she was employed and although the wage slip recorded that she was paid by BACs into a bank account she had no bank account in 1994. She had not produced evidence of a bank account in 1998.

16. In her oral evidence she repeated that she had no place to return to in Nigeria and no family. At the time she left her brother was 12 years old but she did not know what happened to him and she had no contact numbers. She is now 45 years old and her friends and supporters of the church are like family to her in the United Kingdom.

17. In submissions Mr Melvin pointed out that the appellant had been assisted by solicitors previously and they could have approached the HMRC. She had no tax records no National Insurance Number and no bank account or records. The letter from the surgery was two years short of the required period. She had no family life and a private life of over 17 years.

Analysis

18. We were concerned that the documentation was insufficient to support the appellant's claim of residence in the United Kingdom from 1995. We do not accept that only official documentation can evidence residence in the United Kingdom and note that a variety of documentation was provided including letters of support from friends. The analysis is essentially based on the appellant’s private life. She made no mention of family in the United Kingdom with whom she has a relationship going beyond the normal emotional ties.

19. We do acknowledge that she has established a private life but for the purposes of the immigration rules the appellant has to fulfil the following:

> *'**276ADE** (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:*
>
> *(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and*
>
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
>
> *(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or....*
>
> *(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.'*

20. We carefully analysed the documentation and note in particular that there is a letter on file from a Dr Gera who confirmed that the appellant's GP records with the Glyndon Medical Centre dated back to December 2001. A further letter from the Glyndon Medical Centre dated 15th February 2018 recorded that the appellant had been previously registered at the Lister Health Centre Peckham since January 2001.

21. Unfortunately, there were two letters from the Christ Apostolic Church dated 21st December 2010 from Pastor Olalere one of which identified that the appellant had been here for 14 years and the other which appeared identical but did not mention the 14 years. He did not attend as a witness before the Tribunal and thus we place little weight on the document because of the confusion.

22. The appellant stated in her witness statement that she was unable to register with any government agency until 2000 when she became seriously ill and had to attend hospital, sadly, because of a miscarriage. The appellant was registered with a GP practice in 2001 but the hospital records date from 2008. A letter from South London Healthcare NHS Queen Elizabeth Hospital dated 5th November 2011 confirmed that she had two previous second trimester miscarriages and that she had gynaecological complications (multiple fibroids). We note that the appellant maintained that she had mental health problems

but felt unable to attend 'hospital for further treatment' because of her immigration status. We find that the documentation supplied supports her residence on a continuous basis in the United Kingdom from just prior to 2001.

23. There is a signed letter on file from Olubunmi Ayoola, whose passport details were supplied, and who confirmed that the appellant had been known to the witness for 12 years. That letter was dated 7th February 2011, thus since 1999. We are not persuaded that the witness statement of Mr Ayoola, a member of the church, can simply be ignored because he was not present, and it is not an official document. That said, the weight to be given to the statement is reduced because he did not attend to give oral evidence. A further letter from Mrs Olufunke A Twelogbade dated 22nd June 2018 confirmed that she had known the appellant whilst in the United Kingdom since 1998. She, however, supplied her American citizen passport details with a United Kingdom Leave to Remain stamp until 15th October 1994, although it would appear she was given leave to enter on 22nd January 1995 at Gatwick. The letter referred to her British passport, but none was attached. Unfortunately none of the witnesses attended and thus very limited weight can be placed on these letters.

24. There was the BLM Financial Consultancy Limited rent receipt and the receipt had the address of the company. Mr Melvin encouraged us to reject any documentation which did not record an address and although this document did have an address it had very limited details to underpin its reliability and no original was produced.

25. Thus, there were two documents (the rent receipt from BLM Financial Consultancy and the statement of Mr Ayoola) which placed the appellant in the United Kingdom in 1999 but in view of the limited weight we can attach to those documents we are not persuaded that she has been in the United Kingdom since 1999.

26. Although separately these documents may not be sufficient, on the balance of probabilities, to demonstrate the appellant's presence in the United Kingdom for the required length of time, we find that on balance, and in the context of the GP's letter which places her in the United Kingdom just prior to 2001 it is likely that she was present in the United Kingdom from 2000 onwards. We cannot find her present in the United Kingdom prior to that date. She has not lived in the UK for twenty years but most likely from December 2000.

27. In view of her immigration status, and despite the application for the Nigerian passport we think it unlikely that she would leave the United Kingdom without immigration documents. We also acknowledge her evidence that she could not register with a government agency such as HMRC because she was not legal and thus, she did not have a national insurance number and was paid in cash.

28. **ZH (Bangladesh)** [2009] EWCA Civ 8 addressed in some part the question of those who fail to produce records and held that it was relevant to consider the reason and at paragraph 16 Sedley LJ held

> *'The use of a false identity, which was admitted by the appellant, was held against him. But no account was taken, as it seems to me it needed to be taken, of the reason he gave for using it: that he was afraid of being detected as an illegal immigrant. That of course compounds the illegality of his presence here, but it is a different reason from the more sinister reason for using a false identity, which is to commit frauds'*.

29. This length of residence however does not entitle the appellant to succeed under paragraph 276ADE (iv) of the Immigration Rules because she must have been residence in the United Kingdom for 20 years by the date of her application.

30. We turn to consideration of Paragraph 276ADE (vi) and whether there would be very significant obstacles to the applicant's return and find that she has not so demonstrated. The test is a stringent one, **R (Agyarko)** [2017] UKSC 11, and we have undertaken an evaluative assessment. Although it may be challenging for her to return because of the length of time in the United Kingdom and her engagement with the church we are not persuaded that very significant obstacles to her return are so demonstrated. We do accept that she has experienced health difficulties in the form of gynaecological problems and complained of ongoing health difficulties but there was no evidence of a lack of medical facilities in Nigeria. She has some qualifications in healthcare as demonstrated by the certificates produced and has had working experience in this country. She has demonstrated resourcefulness in coming to the United Kingdom following difficulties in Nigeria. She maintained that she had a brother in Nigeria with whom she had lost contact. We note that she has been able to forge close friendships in the United Kingdom but it was unfortunate that no one could attend to support her at court.

31. **Agyarko** confirms that that the test of insurmountable obstacles (or very significant obstacles) does not mean that the obstacles are literally impossible to surmount but mere practical difficulties do not suffice. A bare assertion of insurmountable obstacles is not sufficient. Failure to support any such assertion that the appellant would face insurmountable obstacles is a significant omission, **R (Kaur)** [2018] EWCA Civ 1423 and that proposition holds good for very significant obstacles test.

32. The appellant had lived in Nigeria until the age of 19 years and had at the date of the application been in the United Kingdom for 17 years on our findings.

33. We apply the five-stage process in **Razgar v SSHD** [2004] UKHL 27 which is set out as follows

> *(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
>
> *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*
>
> *(3) If so, is such interference in accordance with the law?*
>
> *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
>
> *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?*

34. We conclude that the appellant has been here now since 2000 and thus has established a private life with which removal will interfere. The threshold for interference is low and thus we conclude that Article 8 is engaged. The applicant on the face of the matter cannot comply with the immigration rules and thus the interference is in accordance with the law. The interference is clearly for the protection of rights and freedoms of others in the form of orderly immigration control.

35. The burden of proof is on the Secretary of State to show that the interference is proportionate and we have adopted a balance sheet approach as recommended in **Hesham Ali** [2016] UKSC 60 in relation to deportation and in cases more widely in **AS v SSHD** [2019] EWCA Civ 417.

36. **R (Agyarko) v SSHD** [2017] UKSC 11 confirmed that the test is one of proportionality and set out

"56 The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2014] 1 WLR 544. Lord Dyson MR, giving the judgment of the court, said, at para 42:

> *"In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal."*

Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as Lord Dyson MR made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, "something very compelling ... is required to outweigh the public interest", applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in Ali.

57 That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all

factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51–52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

37. When making our decision we are obliged to place weight on the position of the Secretary of State and the findings with respect to the Immigration Rules. We have set out that the appellant cannot comply with those rules and we note here that a near miss in terms of the length of residence does not assist the appellant.

38. We are also obliged to comply with Section 117 of the Nationality, Immigration and Asylum Act 2002 and for clarity we set this out

*'**117A** Application of this Part*

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

***117B** Article 8: public interest considerations applicable in all cases*

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

…'

39. We acknowledge that the appellant can speak English, but we are not aware that she is independent financially although there was no evidence of her receiving public funds. That said, **Forman (ss117 A-C considerations)** [2015] UKUT 00412 (IAC) confirmed that the facts that someone can speak English and self-sufficient are neutral factors. In this instance the appellant has been in the United Kingdom illegally for the entirety of her residence.

40. The test as set out in **Huang v SSHD [2007] UKHL 11** still applies and as held

> *"the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8*."

41. Although this refers to family life it can equally be extended to the considerations governing private life.

42. We had no medical evidence of significant mental health difficulties. We do not seek to undermine the strength of her private life because she has been here for many years and clearly has connections with the church, but no one attended the court on behalf of the appellant and she attended alone. The appellant was also emphatic that she had no one in Nigeria and had lost contact with her brother.

43. We find that having taken all factors into account, including the failure of the appellant to comply with the Immigration Rules to which we must accord weight, her relatively young age at present as being 46 years, that she has no family life in this country, although sadly her partner left her when she could not have a child, and her knowingly illegal presence in the United Kingdom from the outset and the lack of explanation or demonstration of any unjustifiably harsh circumstances on return, must count against her. These factors effectively outweigh the factors in favour of the appellant.

44. In view of our reasoning we thus find that the decision to refuse the application for leave to remain is a proportionate decision in relation to Article 8 and we dismiss the appeal.

Decision

Appeal Dismissed

Signed Helen Rimington Date 31st May 2019
Upper Tribunal Judge Rimington

FEE ORDER

We make no fee order in view of the complicated procedural history of the matter.

Signed Helen Rimington Date 31st May 2019
Upper Tribunal Judge Rimington