Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06390/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 30th April 2019	**On the 22nd July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MS HELEN MICHAEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. C Timson, Counsel instructed by Maya Solicitors
For the Respondent: Mr. C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. She appeals the decision of First-tier Tribunal ("F*t*T") Judge Davies promulgated on 26th June 2018 by which the F*t*T Judge dismissed her appeal against the respondent's decision of 15th May 2018 refusing her claim for international protection.

2. The appellant has a lengthy immigration history that is briefly referred to at paragraphs [3] to [13] of the decision of the F*t*T Judge. For present purposes, it is sufficient to note that the appellant claims to have arrived in the UK in January 1995, but, as F*t*T Judge Davies notes at paragraph [4] of his decision, she has given differing evidence as to when she arrived in the UK. In a previous application for leave to remain made by the appellant, she appears to have claimed that she entered the UK in 1985. On any view, whether the appellant arrived in the UK in 1985, 1995 or some later date, her presence in the UK has been unlawful throughout. She first came to the attention of the respondent when she made an application for leave to remain in the UK on grounds of long residence, on 21st March 2007. That application was refused on 20th October 2009. Having then made a number of unsuccessful applications to the respondent, in June 2016, the appellant made a claim for asylum. In August 2016, a referral was made to the Competent Authority in accordance with the National Referral Mechanism, and in September 2016, the appellant received a positive 'reasonable grounds' decision from the Competent Authority. However following further investigation, the Competent Authority concluded, on 17th July 2017, that the appellant is not a victim of human trafficking, slavery, servitude or forced/ compulsory labour.

3. The appellant gave evidence before the F*t*T Judge at the hearing of her appeal. The evidence before the Tribunal is referred to at paragraphs [34] to [46] of the decision. The findings and conclusions of the F*t*T Judge are set out in paragraphs [56] to [68] of the decision. The Judge found the appellant to be a wholly unreliable and untruthful witness, noting that the appellant's immigration history shows that she has taken every opportunity possible, to try to remain in the United Kingdom, even to the extent of venturing into a sham marriage. The Judge found that the appellant has not discharged the burden upon her, to satisfy the Tribunal that there is a serious possibility or reasonable chance that if returned to Nigeria, she will, or may be, persecuted for a Convention reason. The F*t*T Judge went on to consider the appellant's Article 8 claim, and found that the removal of the appellant from the UK will not amount to an interference of the exercise of either her private or family

life. The Judge found that even if Article 8 is engaged, the removal of the appellant is not disproportionate to the legitimate aim sought to be achieved.

The appeal before me

4. In the written grounds of appeal, the appellant submits that the assessment by the F*t*T Judge of the core of the appellant's claim is inadequate, and the decision is heavily focused on the circumstances since the appellant's arrival in UK. As to the length of time that the appellant has been in the UK, the appellant submits that she has lived in the UK for more than 20 years, and in reaching his decision, the F*t*T Judge failed to properly consider the appellant's relationship with her son and grandchildren.

5. Permission to appeal was granted by Upper Tribunal Judge McWilliam on 7th November 2018 on one ground only. Upper Tribunal Judge McWilliam refused permission in respect of the challenge to the decision to dismiss the appeal on asylum and international protection grounds. She noted that the findings of the F*t*T Judge in that respect, are grounded in the evidence, and are adequately reasoned. She noted that the appellant's account was fully rejected, and that there were serious credibility issues. In granting permission, the Judge observed that:

> "It is arguable that the appellant has been here since 1995. It is arguable that the Judge did not properly consider the appellant's appeal under Article 8, with specific reference to paragraph 276ADE. Permission is granted in respect of Article 8 only."

6. Before me, Mr Timson submits that it was central to the appellant's Article 8 claim that she has resided in United Kingdom since 1995. He submits that the Judge did not address the question of whether the appellant has been in the UK for a period of 20 years, and that the failure is material, because if the Judge had found the appellant has been in the UK since 1995, the appellant would be able to satisfy the requirements of paragraph 276ADE(1)(iii) of the immigration rules. Mr Timson submits that although the appellant was disbelieved in respect of all other matters, that is not to say that the appellant could not establish that she has lived in the UK for a period in excess of 20 years. In reaching his decision, the F*t*T Judge was plainly

concerned about the delay in making a claim for asylum, and the F*t*T Judge therefore appears to accept that the appellant has been in the UK for a lengthy period.

7. Mr Bates, properly in my judgement, acknowledges that the F*t*T Judge does not address whether the appellant has lived in the UK since 1995. However, he submits that there was no evidence before the F*t*T Judge supporting the claim by the appellant that she has lived in the UK since 1995, and the respondent has never accepted that she has been in the UK since 1995. He submits that any failure to address that issue, it is therefore immaterial.

Error of law

8. Although I recognise the force of the submission made by Mr. Bates, in my judgement, the failure of the F*t*T Judge to address the appellant's claim that she has been in the UK since 1995, discloses a material error of law in the decision of the F*t*T Judge. The failure is in my judgement material, because paragraph 276ADE(1) of the immigration rules makes provision for leave to remain in the UK on the grounds of private life, where an individual does not fall for refusal on the grounds of suitability, and they have continuously lived in the UK for at least 20 years.

9. Even if the F*t*T Judge did not accept that the appellant has established a family life in the UK with her son and grandchildren, it is plain that the appellant has been in the UK for a lengthy period of time, and is likely to have established some form of private life in the UK. The issue in the appeal, as is often the case, was whether the interference is proportionate to the legitimate public end sought to be achieved. Although the appellant's ability to satisfy the immigration rules is not the question to be determined by the Tribunal in a human rights appeal, the ability to satisfy the rules is capable of being a significant factor when deciding whether refusal is proportionate to the legitimate aim of enforcing immigration control. It was therefore in my judgement, incumbent upon the Judge to consider whether the requirements of paragraph 276ADE(1) of the immigration rules can be met by the

appellant, before there could be a proper assessment of whether the refusal of leave to remain. is proportionate.

10. It follows that in my judgement, the decision of the F*t*T Judge to dismiss the appeal on Article 8 grounds must be set aside. As to the re-making of the decision, Mr. Timson submits that the appellant has letters from people that know of her presence in the UK prior to 2007. He submits that the appropriate course is for me to remit the matter to the F*t*T, so that the appeal on Article 8 grounds can be reheard in the F*t*T. The witnesses were not as court, and in the alternative, Mr. Timson made an application for me to adjourn the hearing to another date, so that I can hear from the appellant's witnesses. I refused the application to remit the matter to the F*t*T for re-hearing, and the application for an adjournment.

11. Directions were issued to the parties in advance of the hearing before me requiring the parties to prepare for the hearing on the basis that, if the Upper Tribunal decides to set aside the determination of the First-tier Tribunal, any further evidence, including supplementary oral evidence, that the Upper Tribunal may need to consider if it decides to re-make the decision, can be so considered at that hearing. No further evidence was relied upon by the appellant and there was no application made pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

12. There is in my judgement, no explanation why the evidence that the appellant now seeks to rely upon, could not, with reasonable diligence, have been made available to the F*t*T at the hearing of the appeal before the F*t*T. Furthermore, there is no satisfactory explanation for the failure to make any application, supported by evidence, pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The grant of permission to appeal by Upper Tribunal Judge McWilliam provided the parties with a very clear steer as to the issues that I would be considering. It must have been obvious to the appellant and/or her representatives, that if the decision of the F*t*T Judge was set aside, the Upper Tribunal would have to determine whether the appellant has been in the UK for a

period of more than 20 years, and that in resolving that question, the appellant would have to refer the Tribunal to the evidence in support of her claim. In any event, in the absence of any further witness statements or evidence, I could not be satisfied that the new material that the appellant seeks to rely upon, would inevitably resolve the factual issue in the appellant's favour.

13. I proceeded to hear submissions from the parties so that I could remake the decision in the Upper Tribunal. Mr. Timson had not been provided with a copy of the manuscript witness statement made by the appellant, that was before the F*t*T Judge. I provided Mr. Timson with a copy of that witness statement, and stood the matter down, so that Mr. Timson could consider the content of that witness statement, and seek instructions before making submissions to me.

14. When the parties returned, on behalf of the respondent, Mr. Bates submits that the appellant has been found to be a wholly incredible witness. She has provided inconsistent information as to when she arrived in the United Kingdom, and there is no evidence at all, of her presence in the UK prior to March 2007. He submits that the appellant has failed to establish on a balance of probabilities, that the appellant has lived in the United Kingdom for a period of at least 20 years. He submits that the appellant is unable to satisfy the requirements of paragraph 276ADE(1)(iii) of the immigration rules. In considering the public interest, s117B Nationality, Immigration and Asylum Act 2002 confirms that the maintenance of effective immigration control is in the public interest and little weight is to be given to a private life that is established by a person at time when the person is in the UK unlawfully, or when the person's immigration status is precarious.

15. In reply, Mr. Timson invites the Tribunal to find that the appellant has been in the UK for at least 20 years. He accepts that other than the assertions made by the appellant in her witness statement that she travelled out of Nigeria in January 1995, there is no evidence before the Tribunal as to when the appellant arrived in United Kingdom. He accepts that there is no documentary evidence at all, that demonstrates the appellant's presence in the UK, prior to 2007. He submits that

although the appellant has not been found to be credible in relation to a claim for international protection, that is not to say that the Tribunal should reject her account that she arrived in the UK in 1995.

Re-making the decision

16. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. As to the Article 8 claim, the burden of proof is upon the appellant to show, on the balance of probabilities, that she has established a family and private life in the UK, and that her removal from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances. I can take into account circumstances at the date of the appeal hearing before me.

17. Paragraph 276ADE(1) of the rules recognises the significant private life that an individual who has continuously lived in the UK for at least 20 years (discounting any period of imprisonment), is likely to have established. I accept, as Mr Timson submits, that although the appellant has not been found to be credible in relation to a claim for international protection, that is not to say that the Tribunal should reject her account that she arrived in the UK in 1995. However, there is in my judgement no doubt here that on any view, the requirement at paragraph 276ADE(1)(iii) of the immigration rules cannot be met by the appellant.

18. Although the appellant claims to have arrived in United Kingdom in 1995, there is quite simply nothing to support that claim. The appellant was found by F*t*T Judge Davies to be a wholly unreliable and untruthful witness. She has already been found to be someone who has taken every opportunity possible, to try to remain in the UK. She arrived in the UK unlawfully and there is no record of her arrival. Although in an asylum interview, she claims to have arrived in the UK on 10th January 1995, in a previous application for leave to remain made in March 2007, she claimed to have arrived in the United Kingdom in 1985. The appellant has given

inconsistent information as to the date of her arrival in the UK, and there is no evidence to indicate arrival in the United Kingdom, on either date. There is no evidence at all before me, to demonstrate any presence in the UK, prior to the appellant's application to the respondent in March 2007, for leave to remain. One might reasonably have expected to see at least some evidence showing that the appellant was in the UK prior to March 2007. There is, for example, nothing to establish where the appellant had been living, and how she was supporting herself, since her arrival in the UK and in the period until March 2007. There is no evidence of her having attended a GP or hospital, and no other evidence from an independent source, attesting to her presence in the UK. I cannot be satisfied, on the balance of probabilities, that the appellant arrived in the United Kingdom in 1995 as she claims. It follows that in my judgement, the appellant cannot satisfy the requirements of paragraph 276ADE(1)(iii) of the immigration rules.

19. The focus under 276ADE(1)(vi) of the rules, is whether there would be very significant obstacles to the appellant's integration into Nigeria if she is required to leave the UK. Mr Timson did not seek to persuade me that if the appellant is unable to satisfy the requirements of paragraph 276ADE(1)(iii), there is evidence of very significant obstacles to the appellant's integration into Nigeria so that the appellant can satisfy the requirements of paragraph 276ADE(1)(vi). Her claim for international protection has been comprehensively rejected by F*t*T Judge Davies, and the evidence before me does not begin to establish any obstacles, let alone very significant obstacles, to the appellant's integration into Nigeria.

20. As to family life, it is uncontroversial that the appellant cannot satisfy the requirements of Appendix FM of the immigration rules.

21. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 establishes that the fact that the rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of

the Rules. It is now well established that Appendix FM and paragraph 276ADE(1) of the immigration rules are said to reflect how the balance will be struck under Article 8 between the right to respect for private and family life, and the legitimate aims listed in article 8(2), so that if an applicant fails to meet the requirements of the Rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK, would breach Article 8.

22. In considering whether the respondent's decision is unlawful under s6 of the Human Rights Act 1998 on Article 8 grounds, I have adopted the step by step approach referred to by Lord Bingham in Razgar -v- SSHD [2004] UKHL 27.

23. Although the appellant's son is now living in the UK, in Kugathas v SSHD [2003] EWCA Civ 31, the Court of Appeal approved the following passage in S v United Kingdom [1984] 40 DR 196 as still relevant:

> "*... generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults … would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.*"

24. The Court of Appeal considered that the further element of dependency did not have to be economic. Accordingly, it will be necessary to show that ties of support, either emotional or economic, are in existence and go beyond the ordinary and natural ties of affection, that would accompany a relationship of that kind.

25. It is clear from the authorities that relationships between adults do not necessarily acquire the protection of Article 8 of the Convention, without evidence of further elements of dependency, involving more than the normal emotional ties. Here, there is very little evidence of any such dependency, but in light of the nature of the relationship between the appellant, her son, and her grandchildren, and the modest threshold applicable, I am prepared to accept that the appellant has established a family life in the UK. I accept that the appellant appears to have been living in the UK since at least March 2007, when she first made an application to the respondent. She will plainly have established a private life in the UK during the lengthy period

that she has been in the United Kingdom. The issue in this appeal, as is often the case, is whether the interference to the private and family life established by the appellant, is proportionate to the legitimate public end sought to be achieved.

26. I remind myself that section 117A of the Nationality, Immigration and Asylum Act 2002 requires that in considering the public interest question, I must (in particular) have regard to the considerations listed in section 117B. I acknowledge that the maintenance of effective immigration controls is in the public interest.

27. There is very little evidence regarding the appellant's son, his partner and their two children, the appellant's grandchildren. The appellant's grandchildren live with their parents, and it is in their best interests to continue to do so. In reaching my decision I have had regard to the best interests of the children as a primary consideration. The appellant claims that her son and his partner heavily rely upon the appellant, and that the uncertainty regarding the appellant's immigration status is having an adverse impact on the mental health of her son. The removal of the appellant from the UK will inevitably impact upon the relationship that the appellant is able to have with her son and grandchildren, but there is no evidence before me to suggest that the appellant would be unable to maintain regular communication with her son, his partner, and her grandchildren, or that they cannot continue the relationship through visits to and from Nigeria.

28. Looked at in the round, an element of the appellant's wish to remain with her son and grandchildren, is the desire to stay in the UK with them, for the simple reason that they love one another, and do not want to be apart. That is an entirely understandable and natural desire. I do not doubt that the appellant would miss them, and they her, but that is something which many, if not most, families have to deal with at some stage in their lives when they relocate because of their relationships, work or any of the multitude of reasons for which people do relocate. Article 8 does not confer upon individuals the right to insist that they should be allowed to enjoy their family life in one country rather than another. Again in the

alternative, they can continue to enjoy their relationship through visits with telephone calls in between.

29. I have noted the practical issue of the support that the appellant claim to give in caring for the children. She is, I accept, a caring grandmother but that is not sufficient to lead to the conclusion that she should be allowed to remain. Other sources of support are available to the appellant's son and his partner, and whilst such support may well not be the same as that is provided by the appellant, there is no evidence that the appellant's son and his partner would not be able to manage nevertheless.

30. Only little weight can be attached to the private life that the appellant has established whilst she has been in the UK unlawfully.

31. Having carefully considered the evidence before me and taking all the relevant factors into account including those in S117B of the 2002 Act, I am satisfied, on the facts here, that the decision to remove the appellant is proportionate to the legitimate aim of immigration control. Accordingly, I am satisfied that the decision to remove the appellant would not be in breach of Article 8.

32. It follows that I dismiss the appeal on Article 8 grounds.

Notice of Decision

33. The decision of F*t*T Judge Davies to dismiss the appellant's appeal on Article 8 grounds is set aside.

34. I remake the decision, and dismiss the appeal on Article 8 grounds.

Signed Date 21st June 2019

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

35. I have dismissed the appeal and I make no fee award.

Signed Date 21st June 2019