Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12009/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 September 2013	**On 22 October 2013**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

ENTRY CLEARANCE OFFICER, LAGOS

Appellant

and

BABATUNDE OREOLUWA OMONIYI

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms O Awogbile instructed by Rhema Solutions

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer, Lagos against a decision of the First-tier Tribunal dismissing an appeal by Mr Omoniyi against the

decision made refusing him entry clearance as a dependent relative under the immigration rules but allowing the appeal under article 8. In this determination I will refer to the parties as they were before the First-tier Tribunal, Mr Omoniyi as the appellant and the Entry Clearance Officer as the respondent.

Background

2. The appellant is a citizen of Nigeria born on 9 September 1985. On 12 April 2012 he applied for entry clearance as the dependent son of his mother and his sponsor, who is settled in the UK and lives with her husband, the appellant's stepfather and her children, his siblings. His application was refused because the respondent was not satisfied that there were any serious and compelling family or other considerations meriting the issue of entry clearance. He took into account the appellant's claim that the family he used to live with in Nigeria no longer wish to accommodate him and that he was living with friends. However, the appellant was 25 years old, had graduated in Social and Management Science in 2009 and had completed further training in 2010. He was currently unemployed but it was the respondent's view that there were no compelling reasons why he should not seek employment in Nigeria and support himself.

The Hearing before the Immigration Judge

3. The judge accepted that the sponsor was a British citizen as were her three younger children aged 19, 15 and 13. Her husband was a full-time university student on a mental health nursing course which he would complete in April 2014. The sponsor worked full-time as a teacher in the prison service. Medical evidence was produced to show that she had hypertension and a letter from her Health Practice said that the stress about the appellant was not assisting this. There were letters from the appellant's siblings emphasising how much they missed him and the two younger children gave evidence to this effect before the judge. There was also a letter from the sponsor's MP to confirm that the family were hard working with strong family ties and a letter from a Christian Centre in Nigeria speaking of the appellant's honesty, hard work and respect for authority.

4. The judge accepted that when the sponsor and the appellant's younger siblings came to the UK, he had remained in Nigeria to complete his education and at that stage his stepfather stayed there to care for him but once he had started his university course his stepfather joined the family in the UK. The judge also accepted that when the appellant was at university family friends were willing to offer him accommodation in vacations but once he left, he was without work and when he needed full-time accommodation, their support dwindled. She accepted that he had had difficulty in finding work and that it was credible that there were individuals in Nigeria who sought to prey on those who had relatives abroad believing they might have access to funds and she was in no doubt that his family missed him and that he very much wanted to rejoin them.

5. However, the judge reminded herself that in order to meet the requirements of paragraph 317 the appellant would have to show that his circumstances amounted to the "most exceptional compassionate circumstances". The judged noted that it had not been asserted that the appellant was unwell in any way. He was able to work if he could find employment. His family in the UK had been financially supporting him and had not indicated that they could not continue to do so. She said the appellant was in a better position than other Nigerian nationals who did not have that family support and that while she had much compassion for the appellant, he did not meet the stringent test required by paragraph 317 and the appeal had to be dismissed under the immigration rules.

6. The judge went on to consider the position under article 8. She accepted that the appellant had established family life within article 8(1) as he was in regular contact with his family, he was never abandoned but had remained in Nigeria for his education and it was always intended that the family would be reunited; he was not married; he had lived with his stepfather until 2007 and then with family friends. The judge said that he might well be an adult but without close family members in Nigeria, he continued to be very much dependent on his family here. Referring to the Tribunal decision in Ghising (family life – adults – Ghurka policy) [2012] UKUT 00160 she concluded that the appellant did enjoy family life with his mother, stepfather and siblings. She found that the respondent's decision would be an interference with that family life, was in accordance with the law and pursued the legitimate aim of a fair and firm immigration policy. She then went on to consider whether the decision was proportionate although I note in this context that in [23] she referred to considering whether removal would be proportionate rather than the refusal of entry clearance.

7. The judge summarised her findings as follows:

> "25. The appellant and his family have always had the expectation that they would be reunited when he completes his education. I doubt that his mother would have left him in Nigeria had she understood that he might not be able to join her; at the time she came he was 16 and would have been granted entry clearance in line with her other children. She left him for his own benefit that his education, which was at a crucial stage would not be interrupted. I accept that she has been devastated by the decision not to permit him entry to the United Kingdom. He would not be coming here to be a drain on state benefits; he has a degree and the family has made plans for his future; he hopes to work in a shortage occupation. The fracturing of this family for the foreseeable future would have a significant impact on every member, it could not be expected that the sponsor and her family here would relocate to Nigeria; they are British citizens and their lives here are well-established. There is no benefit to society in maintaining the split in this family, and I find the decision is not proportionate."

On this basis the appeal was allowed under article 8.

Grounds and Submissions

8. In the grounds of appeal it is argued by the respondent that the judge failed to give any or any adequate reasons for finding that the refusal of entry clearance would be a disproportionate breach of the article 8 rights; it was arguable that the appellant had established an independent life in the interim period since his family relocated to the UK and he had found the means of surviving by staying with friends. Now that he had completed his education no adequate reasons were given why the family could not continue to support him in Nigeria as they had done in the past. Even if the appellant enjoyed family life with his family in the UK, there was no evidence that it went beyond mere emotional ties. His family in the UK were of Nigerian origin and there was no evidence that they had severed ties with their country of origin and so family life could be conducted through visits and modern means of communication.

9. The grounds also argue that the decision was reviewed in February 2013 and that the judge erred by failing to consider the amended Immigration Rules as they apply to entry clearance cases and that the appellant's situation amounts to a "near miss" as considered in the judgment of the Court of Appeal in Miah and Others [2012] EWCA Civ 261. The appellant had stayed in Nigeria to complete his education and had missed the opportunity to join his family in the UK as a minor but he was now an adult and unable to meet the requirements of paragraph 317. As is the case with many graduates the world over, the appellant would be in difficulties finding employment and he was not yet qualified to work in a shortage occupation as quoted and therefore he would not make an immediate impact on the UK economy.

10. Mr Tufan crystallised these grounds arguing that the judge had been wrong to find that there was family life within article 8(1). He referred to Kugathas [2003] EWCA Civ 31 and AAO [2011] EWCA Civ 840 and in particular paragraphs 35 and 43 arguing that the appellant's position was comparable with the applicant in that case where it was held that a finding that there was no family life sufficient to engage the article had been open to the First-tier Tribunal. In any event, he argued that it would not be disproportionate for entry clearance to be refused. The appellant was healthy and continued to live in Nigeria. His family had decided to leave him there so that he could complete his education. They would continue to provide financial support and he would be in a better situation than many other Nigerians of his age: he was educated and getting help from his family.

11. Ms Awogbile submitted that the judge's findings had been open to her. It was not practicable for the sponsor and her family to relocate to Nigeria. The sponsor had been the appellant's sole carer when he was a teenager. She had acted in his best interests by leaving him there to complete his education. She had thought she would be able to bring him to the UK later and had been misled by what she had been told by the Home Office. The appellant was currently homeless. It just did not make sense for him to be left alone in Nigeria. She referred to the Tribunal determinations in MF (Article 8) [2012] UKUT 00303 and Izuazu (article 8 – new rules) [2013] UKUT 00045 and emphasised that there was no test of insurmountable obstacles. The rest of his family were settled in the UK and the family was incomplete without him. The family rights of other family members had to be taken into account and a fair balance struck between the competing interests. There would be a considerable expense to the family if the appellant had to stay in Nigeria. They would need in effect to run two homes and would have to meet the costs of flights to Nigeria. In summary, she argued that the judge had taken all relevant matters into account and had reached a decision open to her.

Consideration of Whether There is an Error of Law

12. The issue for me at this stage of the appeal is whether the First-tier Tribunal Judge erred in law such that the decision should be set aside. It is argued that the judge erred in law firstly, in finding that family life was established and secondly by finding that refusal of entry clearance would be disproportionate to a legitimate aim. I shall deal firstly with the question of family life. In Ghising the Tribunal considered the issue of when the child/parent bond of family life came to an end for the purposes of article 8 (and was upheld on this issue by the Court of Appeal in [2013] EWCA Civ 8). It considered the judgment of the Court of Appeal in Kugathas and accepted a submission that this judgment had been interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg Courts and in particular Eitti-Adegbola v Secretary of State [2009] EWCA Civ 1319 where it was recognised that family life may continue between parent and child even after a child has attained his majority.

13. In RP (Zimbabwe) [2008] EWCA Civ 825 Sedley LJ had said that it would be "unreal" to dispute that a 20 year old appellant enjoyed family life with her parents when she "had lived pretty well continuously with her parents and siblings all her life" and that another appellant who was 25 years old enjoyed family life as he was "economically and emotionally … a member of his immediate family, with whom – that his parents and his two sisters – are now lawfully resident here." The Tribunal also referred to decisions of the ECtHR which indicated that family life between adult children and parents would readily be found without evidence of exceptional dependence and to AA v UK (Application No. 8000/08) where it was held that a significant factor would be whether or not an adult child had

founded family life of his own. If he was still single and living with his parents, he was likely to enjoy a family life with them.

14. The Tribunal summarised its conclusions as follows:

> "62. The different outcomes in cases with superficially similar features emphases to us that the issue under article 8(1) is highly fact sensitive. In our judgement rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists within the meaning of article 8(1). As Wall LJ explained, in the context of family life between siblings:
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> > 'We do not think that Advic is authority for the proposition that Article 8 of the Human Rights Convention can never be engaged when the family life it is sought to establish is that between adult siblings living together. In our judgment the recognition in Advic that, while some generalisations are possible, each case is a fact sensitive and places an obligation on both Adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that article 8 is or is not engaged in a given case. (Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950).' "

15. Applying this approach I am not satisfied that the judge erred in law in finding that family life existed between the appellant and the sponsor, his stepfather and siblings. The judge identified the background which had led to the appellant remaining in Nigeria to complete his education when his mother and siblings moved to the UK. His stepfather had remained with him until 2007 by which time the appellant was at university studying sociology. She accepted the evidence about the appellant's situation that he was homeless and staying with friends and that although he had made numerous applications for work, unemployment was high. He had carried out his National Youth Service. His family had continued to provide him with maintenance and he had not formed his own family. I am satisfied that the judge's decision there was family life was one that was open to her on the evidence and cannot be categorised as irrational or unreasonable and that when the determination is read as a whole it is clear that the judge gave adequate and sustainable reasons for her findings on this issue.

16. I now turn to the issue of proportionality. On this issue I find that the judge did err in law. The judge set out her reasons in [25] and I am satisfied that although she referred to Huang [2007] UKHL 11 and set out that the judgment on proportionality must always involve the striking of a fair balance between the rights of the individual and the interests of the community, she then failed to carry out that balancing exercise.

17. At the end of [25] the judge said, "There is no benefit to society in maintaining the split in this family and I find the decision is not proportionate". That is not an adequate analysis of the public interest in

maintaining an effective system of immigration control by having a known set of rules by which applications are assessed with the benefit to society generally in having a known system which is operated fairly between all applicants. Although the judgment in Miah is referred to in the grounds, this is not a case where there was in fact a near-miss in the appellant's failure to comply with the Rules. As the judge found, the appellant was a long way off meeting the requirement of showing that he was living in the "most exceptional compassionate circumstances "in Nigeria. In EB Kosovo[2008] UKHL 41 Lord Bingham said at [10]:

> "10. In Huang [2007] 2 AC 167, para 16, the House acknowledged the need, in almost any case, to give weight to the established regime of immigration control:
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> > 'The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on."

In R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, para 23, Laws LJ had recognised that

> "Firm immigration control requires consistency of treatment between one aspiring immigrant and another. In a complex and overloaded system perfect equality of treatment between applicants similarly placed will be impossible to achieve, but startling differences of treatment between such applicants, or anything suggestive of randomness or caprice in decision-making must necessarily give grounds for concern."

19. It is not suggested that any issues of committing serious crimes or discouraging fraud and deception are relevant in the present case but the judge failed to consider or to give proper weight to the need for an established regime of immigration control in accordance with the rules. I am satisfied that this error is such that the judge's decision cannot stand and should be set aside.

Re-making the Decision

20. At the hearing both parties agreed that the proper course in the present case would be for me to re-make the decision both parties having made all the submissions they wished on the relevant issues. The circumstances of

the appellant and his family have already been set out but one factor which weighed with the judge was that the appellant and his family had always had the expectation that they would be reunited when he completed his education and she doubted whether his mother would have left him in Nigeria if she had understood he might not be able to join her.

21. The evidence on that issue is set out at [8] where the sponsor said that the Home Office had advised her that when her son had finished his education he could come for settlement. However, I do not accept that the advice was given in a way which could reasonably be interpreted as indicating that the appellant would not need to comply with the immigration rules. The judge commented that the appellant would not be coming here to be a drain on state benefits and that he hoped to work in a shortage occupation. This may well be the case but the hard fact is that employment opportunities are scarce in the UK just as they are in Nigeria. Further, it is not suggested that the appellant is able to meet any of the requirements of the rules for obtaining entry clearance to work. The appellant lost the right to apply as a dependent child when he became 18 in September 2003. His application was made in April 2012. He had graduated in management science in 2009 and completed further training in 2010. He is well-educated and is likely to receive financial support from his family in the UK. In so far as he might be preyed on by those seeking money, there is no reason why he cannot look to the authorities for protection. There are no sufficiently compelling features to make the refusal of entry clearance disproportionate in the appellant's circumstances.

22. Balancing these various factors, although I can understand the appellant's wish to join his family and their wish that he join them, the public interest in maintaining effective immigration control and the need to have immigration rules which are applied consistently and fairly outweighs the interference with the right to respect for the family life of the appellant and his family members. I am satisfied that the refusal of entry clearance is proportionate to a legitimate aim.

Decision

23. The First-tier Tribunal erred in law and I set aside the decision. I re-make the decision dismissing the appeal on both immigration and human rights grounds.

Signed Date: 21 October 2013

Upper Tribunal Judge Latter