Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04915/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25th September 2014	**On 15th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE HARRIES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS EKOMOBONG ETUKUDO EKPRO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery
For the Respondent: Mr D Medhurst, Counsel

DETERMINATION AND REASONS

Details of the Parties and Proceedings

1. The appellant in the Upper Tribunal is the Secretary of State for the Home Department. The respondent, Miss Ekpro, is referred to hereafter as the claimant. She is a citizen of Nigeria born on 22nd September 1992. On 19th September 2013 she made an application for leave to remain in the United Kingdom as a Tier 4 (General) Student Migrant under the points-based system. The application was refused by the Secretary of State for the Home Department on 13th November 2013 on the basis that she had failed to demonstrate in the documents submitted with her application that

she had the requisite funds for maintenance, namely £1,600 for the 28 days from 15th August 2013 to 11th September 2013.

2. The claimant had first been granted leave to enter the United Kingdom as a Tier 4 (General) Student on 6th October 2009. That leave was further extended on 25th August 2010. In effect the claimant was seeking a further extension of leave in order to finish her course which was due for completion in September 2014. The claimant appealed against the refusal, which appeal came before First-tier Tribunal Judge Stokes (the Judge) on 3rd March 2014.

3. The appeal was dismissed under the Immigration Rules but the Judge noted in paragraph 24 of the determination that the claimant had lived and studied in the United Kingdom since 29 September 2009. She was then in the middle of an LLM course which commenced on 19th September 2013 and was due to be completed on 30th September 2014 and for which she had paid the fees in full. The Judge found that in the circumstances it was disproportionate for her to be removed pending the completion of that course and allowed the appeal on human rights grounds.

4. The Secretary of State for the Home Department sought permission to appeal to the Upper Tribunal against that decision on the grounds that that the only reason for the appeal being allowed was on the basis of continuing to finish the course. In those circumstances it was contended that that was not a right which engaged Article 8 in the circumstances. Leave to appeal was granted on that basis and there was an initial hearing before Upper Tribunal Judge King TD on 17th June 2014 who found that there was an error in the approach taken by the Judge in relying simply upon education.

5. He set aside the decision and found it to be in the interests of justice to allow the claimant, through her representative, to develop such arguments as may be appropriate in the circumstances. He retained the matter within the Upper Tribunal for those arguments to be advanced and the matter accordingly comes before me for further hearing following the making of a transfer order in the light of Upper Tribunal Judge King's unavailability today.

The Law

6. Article 8 of the ECHR provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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.

7. The burden of proof in relation to Article 8 of the ECHR lies with the claimant. She must prove on the balance of probabilities that private or family life is established and will be interfered with as a result of the Secretary of State's decision. Once she has established that she enjoys this protected right which is threatened with violation the burden shifts to the Secretary of State to show that the interference is lawful and in pursuit of a legitimate aim; it must be shown that the violation is justified and that it does not impair the right any more than is necessary; in other words, whether the interference is proportionate.

8. On 28th July 2014 section 19 of the Immigration Act 2014 made amendments to the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. These statutory provisions apply to all appeals heard on or after 28 July 2014, irrespective of when the application or immigration decision was made. Part 5A only applies where the Tribunal considers article 8(2) ECHR directly. Section 117A is as follows:

> 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).

9. Section 117B is as follows:

> 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.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

My Consideration of the Evidence and Issues

10. The core submission made for the claimant by Mr Medhurst is that there are factors within this particular case that make it of a different order to the usual. In accordance with previous directions a full skeleton argument has been submitted for this hearing outlining the case that it is not the mere fact that the appellant wishes to complete her studies that brings her within Article 8. I take full account of these submissions but the evidence shows that matters have moved on significantly since the last hearing.

11. The claimant attended the hearing and gave oral evidence by adopting her new statement dated 19th September 2014. The position is that she has now completed her LLM course at the University of Sussex; her dissertation has been submitted and she awaits the result of her degree which will be known by 23rd October 2014. All being well, she hopes to graduate in the last two weeks of January 2015.

12. The accepted background to the matter is that the claimant submitted the wrong bank statements with her application; had she submitted the correct ones her application would have succeeded. She had the necessary funds from the outset but unfortunately used the wrong statements to demonstrate her ability, meaning that in accordance with the case of Raju [2013] UKUT 00610 (IAC) she was prohibited from using subsequent evidence to overcome the shortfall in the original evidence. She accordingly could not meet the requirements of the Immigration Rules, but had it not been for the mistake she would have satisfied the Rules.

13. It is submitted for the claimant that it is relevant to consider in the exercise of Article 8 these difficult circumstances which were further complicated by the immigration decision being issued in November 2013 but not being not received by the claimant until January 2014. The claimant's evidence is that the late receipt was for reasons entirely beyond her control, namely error on the part of the Royal Mail, resulting in the delay in delivery. Had she received the decision in time she would have been given the opportunity to make a fresh application within 28 days. She claims to have raised the matter directly with the Secretary of State in order to request an extension of the 28 day period but it was not accepted that the decision was not received until January 2014.

14. It is submitted that this is a relevant consideration because the claimant was obliged to bring an appeal in order to preserve her situation and her leave to remain. This is

submitted to be an exceptional situation and the claimant should be treated fairly in accordance with Patel [2011] UKUT 211. It is accepted that following the case of Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC) only if there are "arguably good grounds" for granting leave to remain outside the Rules is it necessary for the Tribunal for Article 8 purposes to go on to consider whether there are "compelling circumstances not sufficiently recognised by the Rules".

15. The claimant relies upon the case of CDS (PBS: "available": Article 8) Brazil [2010] UKUT 00305 (IAC) to show that her removal would have sufficiently grave consequences as to engage Article 8; she has built up a connection with her course, as well as the ultimate professional qualification sought; she has formed social ties during the period of study. The claimant's studies are submitted to be directly connected with her plan to further qualify in Nigeria.

16. There is accepted to be no "near miss" principle, but Mr Medhurst relied on the case of Nasim & Others (Article 8) [2014] UKUT 00025 (IAC) in which it was observed that it would be wrong to say that the point has been reached where an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate. The claimant states that by reason of errors, one of which was entirely beyond her control, she is now at risk of extremely harsh and disproportionate consequences.

17. The claimant relies on the damage caused to her established private life. She gives evidence that she has committed a great deal of energy, work and financial resource into completing her LLM. Since her arrival in the United Kingdom on 6th October 2009 she has built up a network of friends and contacts here; she has cousins and uncles living in Bishop Stortford and London. She states that she has friends who were fellow students at the University of Sussex providing contacts which may be vital to the development of her future career. The claimant's evidence is that she plans to return to Nigeria to qualify as a barrister in the field of commercial law and it will be important to maintain and develop these professional and academic contacts in the United Kingdom.

18. I return to the evidence of the claimant's current position which has changed significantly since the first hearing of this appeal; she has now completed her studies which will not be disrupted as a consequence of the decision of the Secretary of State. The claimant asks, however, to be allowed to remain in the United Kingdom so that she can graduate in person in January 2015 and celebrate her success here. If she has to return to Nigeria between now and then she states that she will face the expense of returning to the United Kingdom as a visitor.

19. In these circumstances I find merit in the submissions for the Secretary of State made by Mr Avery that it is difficult to see how Article 8 of the ECHR is engaged. If, however, I take the claimant's case at its height and accept that a combination of errors has worked harshly against her so that she could otherwise have succeeded in

her application under the Immigration Rules I find that the appeal could still not succeed on a free-standing consideration under Article 8 of the ECHR.

20. The claimant realistically does not argue her case on grounds of protected Article 8 family life in the United Kingdom. She makes no more than passing reference to family members and I find that family life is not shown to exist. Applying the 5-stage test in Razgar to the claimant's established private life in the United Kingdom I am satisfied that the answer to the first four questions is in the affirmative. I am further satisfied that the answer to fifth question is also "yes", namely that the interference to the appellant's private life is proportionate to the legitimate public end sought to be achieved.

21. The fact that the maintenance of effective immigration controls is in the public interest is now set out in statute; I must, and do, have regard to that in assessing proportionality. I attach weight to the public interest and for all the following reasons I find it not to be outweighed by the claimant's right to respect for her private life in the circumstances of this case. The claimant has at all times been present in the United Kingdom for temporary purposes, primarily to study and those studies are now complete. There is no disruption to those studies caused by the decision of the Secretary of State.

22. The evidence does not in my view support the submission that the claimant faces "extremely harsh and disproportionate consequences". In considering her evidence of the importance of maintaining and developing her professional and academic contacts in the United Kingdom I see no reason for this not to be possible after her return to Nigeria. Her evidence is that she intends to return to Nigeria to work and in these circumstances I find any interference with her private life caused by the decision of the respondent to be minimal. Her private life can continue in my view with little, if any, disruption at a distance in circumstances where she has now completed her time at the university where these links were formed.

23. Even if there has been error on the part of the Royal Mail contributing to the refusal of the claimant's application, as well as her own error, I am not satisfied that the Secretary of State has acted unfairly. She made a decision on the facts before her which showed the requirements of the Immigration Rules not to be met on the evidence available at the relevant time.

24. In terms of the consequence of having to return to Nigeria before her graduation in January 2015 the evidence does not show any bar, including expense, to the claimant returning to the United Kingdom in order to attend the graduation. Her evidence is that she will do so. The sequence of events leading to the refusal of her application may well have caused additional expense to the claimant but that does not carry any weight of significance in her favour in the balancing exercise; she has expended time and money in pursuit of her studies but successfully so by completing those studies. I find that the appeal cannot succeed under Article 8 of the ECHR or on any other grounds.

Summary of Decisions

25. The decision of the First-tier Tribunal allowing the appeal on human rights grounds has previously been set aside.

26. I remake the decision by dismissing the appeal under Article 8 of the ECHR.

27. This appeal to the Upper Tribunal by the Secretary of State for the Home Department succeeds.

Anonymity

The position remains that First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed:

J Harries

Deputy Upper Tribunal Judge
Date: 10th October 2014

Fee Award

The position remains that no fee award has been made.

Signed:

J Harries

Deputy Upper Tribunal Judge
Date: 10th October 2014