



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/30336/2013**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Determination

On 19 August 2014

Promulgated

On 19th Aug 2014

Before

Deputy Upper Tribunal Judge MANUELL

Between

**Mr ABIODUN OKONO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian, Authorised Representative
(D J Webb & Co)

For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

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1. The Appellant appealed with permission granted by First-tier Tribunal Judge Page on 23 June 2014 against the determination of First-tier Tribunal Judge Fletcher-Hill who had dismissed the Appellant's appeal against the Respondent's decision dated 4 July 2014 to refuse to grant the Appellant leave to remain as a Tier 1 (Entrepreneur) Migrant under the Immigration Rules in a determination promulgated on 5 June 2014.
2. The Appellant is a national of Nigeria, whose date of birth was given as 25 December 1982. He had entered the United Kingdom as a Tier 4 Student on 4 March 2008, which leave had been extended until 3 May 2011. He was then granted leave to remain as a Tier 1 (Post-study Worker) Migrant until 17 June 2013. He had next applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant.
3. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Page because he considered that it was arguable that the judge had failed to deal with the Article 8 ECHR private life claim which the Appellant had raised in his Notice of Appeal (in response to the section 120 notice) and had argued at the appeal hearing.

Submissions - error of law

4. Mr Walker for the Secretary of State was content to adopt the tribunal's preliminary view that this was a clear case of legal error in relation to the Article 8 ECHR private life claim, as the grant of permission to appeal indicated.
5. Mr Youssefian for the Appellant agreed.

The error of law finding

6. The tribunal indicated that it found that the judge had fallen into material error of law. The determination recorded that submissions had been made in relation to the Appellant's private life in the United Kingdom, but was silent as to any findings and decision on that issue. The judge had been correct to dismiss the Immigration Rules appeal, but it was a material error of law not to determine

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the Article 8 ECHR claim. The Article 8 ECHR decision of the First-tier Tribunal was set aside for material error of law. The decision had therefore to be remade. Both parties were willing for the rehearing to proceed immediately, as this had been foreshadowed by the Upper Tribunal's standard directions.

The rehearing

7. As the only live issue was Article 8 ECHR, the claim needed to be reheard on the basis of the facts as at the date of the rehearing before the Upper Tribunal. Section 117 A-D of the Nationality, Immigration and Asylum Act 2002 applied.
8. Evidence in the form of a witness statement dated 12 August 2014 made by the Appellant had been filed. The Appellant stated that he was unable to attend the hearing because of pressing work commitments. In summary the Appellant recalled his immigration history and said that although he had not satisfied the requirements of the Immigration Rules, he had established a genuine business in the United Kingdom, from which he earned his living. While studying for his Masters degree he had decided to make the United Kingdom his home. He believed that his company would succeed and contribute to the economy. The Appellant had friends in the United Kingdom and now had little contact with anyone in Nigeria.
9. Mr Walker for the Respondent raised no specific credibility challenge and submitted that the Appellant could return to Nigeria where he had spent most of his life without undue difficulty. The Appellant could not satisfy the Immigration Rules. Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 00640 (IAC) applied. His personal preference to remain in the United Kingdom was not a relevant consideration. The Appellant had been in the United Kingdom for a relatively short period of time. He had come as a student with the intention to return. No exceptional circumstances had been identified. The appeal should be dismissed.
10. Mr Youssefian for the Appellant submitted that although the Appellant could not meet paragraph 276ADE of the Immigration Rules, he had established a private life. Examined against section 117B of the Nationality, Immigration and Asylum Act 2002, the Appellant satisfied

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the factors listed. He spoke English, was independent and not a burden on the taxpayer. He had always been in the United Kingdom lawfully. The Respondent had failed to justify the decision against the legitimate objective of immigration control. There was no public interest in his removal. When all factors were considered, the appeal fell to be allowed under Article 8 ECHR.

Discussion and fresh decision

11. There was no significant dispute of fact in this appeal. The Appellant has successfully studied in the United Kingdom and now says that he has started a business which is sufficiently profitable to support him. The tribunal is prepared to accept that assertion for the purposes of this appeal although there was no evidence of actual trading. The tribunal is also prepared to accept that the Appellant has friends in the United Kingdom. The problem is that the Appellant is unable to satisfy any relevant part of the Immigration Rules. Although his leave to remain continues by virtue of section 3C of the Immigration Act 1971, it is in fact doubtful that he has any leave to run a business as his previous leave was as an employee in the Post-study Worker category of Tier 1.
12. Nasim and Others (Article 8) [2014] UKUT 00025 (IAC) applies to the Appellant's limited private life in the United Kingdom, which is of short duration. There was no evidence produced to the tribunal to show that the Appellant's removal would lead to unduly harsh consequences for him. The Appellant's business was established at a time when he had no guarantee that he would be able to stay in the United Kingdom beyond the period required for the Secretary of State to decide his Tier 1 (Entrepreneur) application. There was no evidence that the Appellant had purchased property in the United Kingdom or had otherwise put down roots.
13. There was no factor in the Appellant's circumstances which the tribunal considers was such as to require the Secretary of State to consider the exercise of her discretion outside the Immigration Rules. The Secretary of State had not specifically considered the Appellant's Article 8 ECHR private life in her notice of decision, but the effect of the service of the section 120 notice was to shift that decision

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to the First-tier Tribunal: see AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076.

14. The fact that the Appellant meets the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002 does not create a right for him to stay in the United Kingdom. They are merely factors which must be taken into consideration, and the tribunal has done so.
15. If that were a mistaken view for any reason, the live issue applying the Razgar [2004] UKHL 27 tests is proportionality. The legitimate objective is immigration control, which embraces many related matters. An important aspect of immigration control for the purposes of the present appeal is that the decision as to which non citizens are permitted to settle in the United Kingdom is not a matter of private choice, whether or not there will be any measurable cost or indeed potential economic benefit from such settlement. There has to be a rule, democratically determined, which applies to all. Those rules, already strict, were made far more strict from 9 July 2012 onwards, a process which continues.
16. In the tribunal's view, the proportionality balance is against the Appellant. He is simply being required to resume his life in Nigeria, a familiar life which has been interrupted by study and post-study work in the United Kingdom. His removal to his home country cannot be regarded as unreasonable nor will it create consequences which can sensibly be considered as unduly harsh for him.
17. Thus, however the Appellant's appeal is analysed, it must fail.
18. There was no application for an anonymity direction and the tribunal sees no need for one.

DECISION

The making of the previous decision involved the making of an error on a point of law. The tribunal allows the onwards appeal to the Upper Tribunal, sets aside the original decision to the extent that it failed to deal with the Article 8 ECHR claim and remakes that part of the original decision as follows:

The appeal is dismissed under Article 8 ECHR

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Signed

Dated

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT
FEE AWARD

The appeal was dismissed and so there can be no fee award

Signed

Dated

Deputy Upper Tribunal Judge Manuell