Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53479/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 June 2014	**On 30 June 2014**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWATOBI OMOKHEPEN SMITH

Respondent

Representation:

For the Appellant: Mr P Nath, Home Office Presenting Officer
For the Respondent: Mr B Kpogho of Able Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal (FTTJ Malone) allowing an appeal by the applicant against the decision made on 13 November 2013 to refuse her further leave to remain and remove her to Nigeria. In this determination I will refer to the parties as they were before the First-tier Tribunal, the Secretary of State as the respondent and the applicant as the appellant.

© CROWN COPYRIGHT 2014

Background

2. The appellant is a citizen of Nigeria, born on 14 July 1992. On 20 August 2008 she was granted leave to enter as a student until 30 September 2010. Subsequently, she was granted further leave to remain as a Tier 4 (General) Student until 30 September 2013. On 26 August 2013 she applied for further leave to remain in the same capacity.

3. However, her application was refused. Whilst she was awarded 30 points under Appendix A (Attributes) in the light of the confirmation of acceptance for studies submitted, she failed to meet the requirements of Appendix C (Maintenance/Funds). She was required to show that she would have the necessary funds to cover fees for the first academic year of her course and funds of £800 per month for two months. She had to show that she was in possession of £15,100 for a consecutive 28 day period no earlier than 31 days before the date of application. The statements she submitted were more than 31 days before the date of application. She had also relied on funds from her parents' bank account but had not provided a consent letter for the funds to be used in support of the application. For these reasons her application was refused.

4. She appealed against this decision and her appeal was heard by the First-tier Tribunal on 13 March 2014. The judge heard evidence from the appellant and from her cousin, David Otohwo, a British citizen. The judge accepted that the appellant had first come to the UK in August 2008 to study. She had obtained her A levels and then went on to graduate from the University of Bradford as a BSc in Business Economics achieving a 2:1 degree. She graduated in July 2013. She went on to read for an MSc in International Management at Loughborough University and it was to enable her to follow this course that she made her Tier 4 application on 26 August 2013. It was accepted that the appellant failed to provide the necessary bank statements covering the period specified by the Rules and the judge rightly held that it followed that she could not satisfy paragraph 245ZX and that her appeal under the Immigration Rules had to be dismissed [19].

5. The judge went on to consider Article 8. He recorded at [22] that at the hearing he was provided with bank statements that showed that as at the date of application the appellant had had the required funds available to her for the requisite period in the accounts of her mother and Mr Otohwo. He heard evidence about how her studies were funded. Mr Otohwo would provide the funds out of his own money and then reclaim it from the appellant's mother. He was having a holiday home built in Nigeria for which the appellant's mother was paying and they ran a contra account. Her mother works out how much she has paid for Mr Otohwo's house while he works out how much the appellant's funding has cost and a balancing payment is made. Having considered the evidence before him the judge accepted that the required funding had been available when the application was made.

6. He accepted that the appellant was a genuine and hard-working student and that she was working hard for her finals. He said that for her to return to Nigeria without her post-graduate qualification having already spent such a sizeable sum on her second degree would be disastrous [35].

7. The judge went on to consider Article 8 finding that the appellant enjoyed private life in the UK and that her removal would interfere with that private life. It would be in accordance with the law and in pursuance of a legitimate aim. He went on to address the question of proportionality and found that removal would be disproportionate. He said that the disruption to the appellant's studies would be about as severe as it could be and would serve no useful purpose. He acknowledged that it was unfortunate that she had not provided the respondent with the detailed financial information he had seen which showed that she satisfied those requirements. He summarised his findings as follows:

> "41. I answer the question Lord Bingham posed in paragraph 20 of his opinion in Huang, suitably adapted to address private life, in the affirmative. The Appellant's removal would therefore be unlawful.
>
> 42. I found the Appellant and Mr. Otohwo to be engaging individuals. I recommend that the Appellant be given leave to remain until, say, February 2015 which would enable her to stay here for her graduation, the date of which is uncertain but should have taken place by then. As I say, the Appellant told me that, on graduation, she will return to Nigeria and resume life there.
>
> 43. I find that the Respondent's decision is not in accordance with the law and the Immigration Rules. This appeal must therefore be allowed."

The Grounds of Appeal and Submissions

8. In the respondent's grounds it is argued that the judge erred in law in that having concluded that the appellant could not meet the financial requirements of the Rules for Tier 4 Migrants or the private life requirements set out at para 276ADE he should not have simply gone on to consider Article 8 with regard EB (Kosovo) [2008] UKHL 41 and Huang [2007] UKHL 11. He should have considered whether there were compelling circumstances not sufficiently recognised under the new Rules to require the grant of such leave: Nagre v Secretary of State [2013] EWHC 720 (Admin). Further, in finding that removal would be disproportionate on the basis that it would cause disruption to the appellant's continuing education in the UK, the judge had failed to take account of the guidance given in Patel and Others v Secretary of State for the Home Department [2013] UKSC 72 and in particular [57].

9. Mr Nath adopted these grounds in his submissions arguing that the judge had erred in law by failing to consider the public interest in maintaining immigration control particularly in the light of the judgment in Nagre and the determination in Gulshan [2013] UKUT 640. He had further erred in his approach to education failing to take into account the comments of the Supreme Court in Patel.

10. Mr Kpogho submitted that the appellant had more than private life in the UK. She had been staying for a number of years with her relatives and this added a significant element to her private life. Her position could be distinguished from Patel. The appellant was in the middle of her exams. Her course would be completed in September and she would graduate in February 2015. He submitted that the judge had reached a decision properly open to him.

11. In reply Mr Nath emphasised that the appellant had not met the requirements of the Rules and the judge had not followed the proper approach when assessing Article 8. He had not been entitled to treat Article 8 as a power to dispense with the Rules.

The Error of Law

12. The issue for me at this stage of the appeal is whether the judge erred in law such that the decision should be set aside. I am satisfied that he did for the following reasons. The changes to the Immigration Rules in July 2012 were intended to set out how the balance under Article 8 should be struck between the right to respect for private and family life and the legitimate aims set out under Article 8(2). This general purpose is set out in GEN1.1. Further, the requirements for obtaining leave as a student are set out as part of the points-based scheme with a requirement that specified evidence should be provided with the application as identified in the Rules. The provisions of s.85A of the 2002 Act were enacted to make it clear that at the hearing of an appeal against an adverse decision reliance could only be placed on evidence not produced at the date of application save in a number of identified circumstances, none of which apply in the present case.

13. The appellant sought to rely on private life within Article 8 but she could not meet the requirements of paragraph 276ADE. In assessing whether the refusal of further leave was disproportionate the judge should have followed the guidance in MF (Nigeria) v Secretary of State [2013] EWCA Civ 1192, Nagre and Gulshan and in a case where the requirements of the Rules could not be met considered whether there were exceptional or compelling circumstances not sufficiently recognised under the Rules so justifying further consideration under Article 8. The judge clearly attached considerable weight to the fact that the applicant could have met the requirements of the points-based scheme had the evidence been available at the date of application. However, that overlooks the purpose of s.85A which prevent the further evidence considered by the judge being admitted in an appeal under the Rules.

14. The judge said in [20] that he attached significant weight to the fact that the appellant could not meet the requirements of paragraph 276ADE but he failed to give any weight to the purpose of the points-based scheme requiring all evidence to be produced with the application. Further, in Patel the Supreme Court held that the right to education was not in itself a right falling within Article 8 and that Article 8 must not be used as a dispensing power.

15. I am therefore satisfied that the judge failed to approach Article 8 in accordance with the approach set out in the authorities to which I have already referred and failed to give proper weight to the public interest set out in the Immigration Rules both in relation to the points-based scheme and the need to maintain immigration control. He also failed to consider what the Supreme Court have said about the right to education not being in itself a right within Article 8. These errors had a material bearing on the judge's findings and conclusions and for this reason the decision should be set aside.

Re-making the Decision

16. Mr Nath submitted that the appellant only had a very restricted private life and that the failure to meet the requirements of the Rules meant that the public interest outweighed any interference with her private life. The appeal, he submitted, should be dismissed. Mr Kpogho submitted that in fact the applicant had a very strong private life and in the light of the history of her studies in this country, it would be disproportionate for the appeal to be dismissed under Article 8 not least as all her fees had been fully paid. I also heard from both the appellant and Mr Otohwo who confirmed her circumstances. The appellant said that after she completed her studies she would be returning to Nigeria. She was just coming up to exams. There was one further piece of coursework and her course would be completed in September.

17. This is a case where the appellant is not able to meet the requirements of the Rules for further leave to remain as a student or on private life grounds. She failed to produce the evidence specified in the Rules when she applied for an extension of her stay to complete her course. The fact that she was later able to show that she could meet those requirements would not help her so far as the immigration appeal was concerned as that evidence would be excluded under s.85A(3)(b). I would accept that it is admissible in relation to Article 8 but in the light of the purpose of the Rules and in particular the way the points-based system is structured and administered, it must be a matter of relatively little weight. Article 8 cannot be used as a way of dispensing with the requirements of the Rules.

18. Having considered the Rules, the proper approach is to consider whether there are exceptional or compelling circumstances which justify further consideration under Article 8. I am not satisfied that there are. There is no reason to doubt that the appellant is, as the judge found, a hard-working and genuine student and the interference with her studies is without doubt unfortunate. However, the primary reason for that arises from the failure to produce the evidence required when her

application for an extension was made. I am not satisfied that there are any circumstances which can properly be described as exceptional or compelling particularly in the light of what Lord Carnwath said in Patel at [57] that the right to an education is not in itself a right protected under Article 8. I also take into account the cautionary note he struck by commenting that Article 8 was not to be used as a general dispensing power.

19. In these circumstances I am not satisfied that the interference with the appellant's right to respect for her private life is such that the refusal for further leave to remain and the requirement to leave is disproportionate to a legitimate aim. It is correct that the appellant is now very near the completion of her course. However, it must be a matter for the respondent to consider whether as an exercise of discretion outside the Rules the appellant is permitted to remain to complete her course.

Decision

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

Signed Date: 27 June 2014

Upper Tribunal Judge Latter