Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04858/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 6th July 2015

Decision and Reasons Promulgated
On 20th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

OVA
(anonymity direction made)

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms S. Wortley, Counsel instructed by Paul John & Co Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Nigeria who is now aged 45. On the 6th January 2015 the First-tier Tribunal (Judge Abebrese) allowed his appeal against a decision to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999. Although the Respondent failed in his protection-based claim the Tribunal found that his removal would be a disproportionate interference with his Article 8 rights. The Secretary of State now has permission to appeal[1] against the First-tier Tribunal's decision.

[1] Granted by Designated First-tier Tribunal Judge Garratt on the 12th February 2015

Error of Law

2. The grounds of appeal contend that in conducting the proportionality balancing exercise under Article 8 'outside of the Rules' the Tribunal failed to have regard to, or make findings on, the matters set out in s117B of the Nationality Asylum and Immigration Act 2002 (as amended by the Immigration Act 1971).

3. That submission has merit. Article 8 is dealt with in a single paragraph of the decision wherein the Tribunal fails to specifically address each of the mandatory considerations set out by parliament in that section of the Act. There is, for instance, no recognition of the fact that the maintenance of immigration control is in the public interest, nor any findings on whether the Respondent speaks English, nor whether he is financially self-sufficient. The Tribunal appears to have placed significant weight on the fact that the Respondent is in a long-term relationship with an EEA national, with no consideration of the terms of s117B(4) which states that "little weight" is to be placed on such a relationship where the person subject to immigration control is in the UK unlawfully when it is established. The reasoning in respect of Article 8 'outside of the rules' is therefore flawed and must be set aside.

4. The grounds further contend that the Judge failed to give reasons why it was accepted that the Respondent was in a relationship at all. This ground has no merit: it is noted at paragraph 6 of the determination that the claim that he was in a relationship with a Latvian national was not contested by the Secretary of State at the hearing. The Secretary of State cannot therefore complain that the Tribunal proceeded on that basis.

5. The 'error of law' hearing took place on the 9th June 2015. At that hearing the parties agreed that the re-making of the Article 8 appeal should be adjourned, to enable me to hear from the Respondent's partner. She was not present at the initial hearing because she was in Glasgow caring for her elderly father. I agreed. Before doing so I observed that the determination appears to contain a discrete error in that the First-tier Tribunal applied the old test in paragraph 276ADE(vi):

> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK"

When in fact it should have applied the new test:

> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK

6. The parties were in agreement that the outcome may have turned on this. The Respondent lived in Nigeria for much of his adult life and could not therefore successfully argue that he had "no ties" to that country. However on the particular

facts of this case – he is an HIV patient with a Latvian partner who claims to have no contact with any surviving family members, nor any means of supporting himself in Nigeria – the "very significant obstacles" test would appear to be arguable. The Secretary of State agreed that in the re-making of Article 8 I should have regard to the current rules.

The Re-Made Decision

7. I heard evidence from the Respondent, from his partner P, and her adult daughter C1. I was provided with documentary evidence, including letters in respect of P's minor son, C2. I have taken all of the evidence before me into account, including that which is not expressly mentioned herein.

Paragraph 276ADE(1)(vi)

8. I must begin my assessment of Article 8 by considering whether the Respondent can meet the requirements of sub-section (vi) of paragraph 276ADE of the Rules. The parties were in agreement that the Respondent could not meet any of the other alternative provisions therein; nor could he succeed with reference to Appendix FM, since he cannot meet the definition of 'partner' in GEN.1.2. (for which see below). The applicable test is whether there are "very significant obstacles" to his re-integration in Nigeria. The standard of proof is the balance of probabilities.

9. The Respondent's case is that he has no living family in Nigeria with whom he is in contact, and that he has no friends with whom he could re-establish ties. He has not lived in that country since he left it in 2000. He states that before he left his family had been forced to move to Kaduna, a violent land dispute having arisen in their home state of Imo. Shortly after they had re-established themselves in Kaduna communal strife broke out and their family home was attacked by Muslims. The Respondent claims that his mother and siblings were killed and that as a result he suffers from depression and flashbacks, and finds being in large crowds distressing and frightening. The Respondent had been working as a peddler, selling mainly fruit and vegetables, but he avers that he would not be able to do that kind of work today, partly because he has forgotten how to do it and partly because of his health. He is HIV+ and states that he is unable to stand for any length of time because he gets pains in his legs. Although he receives emotional and practical support from a Christian group here in the UK no such assistance would be available to him in Nigeria. The Respondent states that in Nigeria he would not receive any charity and that he would face discrimination and stigma as a result of his illness.

10. I do not find it credible that the Respondent would not be able to work in Nigeria. He has worked in that country previously and upon leaving Nigeria he travelled to South Korea where he set up his own business in import/export. I agree with Mr Clarke that this shows the Respondent to be a resourceful and hard-working individual. I do not accept that he has "forgotten" how to run a business or work. Nor do I accept that he is too ill to work. His testimony that he suffers from pain in his legs such that he is unable to stand is not supported by medical evidence; I also note that it would appear to be at odds with his admission that since his arrival in the

UK he has worked (illegally) as a roadsweeper. The Respondent is an adult who has managed to work in Nigeria, South Korea and the UK. He could therefore work to support himself in Nigeria. In those circumstances the question of whether he has any friends or family there is moot: he had no friends or family in either South Korea or the UK and yet managed to establish himself in both of these countries. The Respondent's response when asked about obstacles was to refer to his relationship with P; she being unable and/or unwilling to go to Nigeria his relationship with her would come to an end. That might be an unfortunate consequence of his removal to Nigeria, but it is not something that would present an obstacle to his integration there. The Respondent further claims to be suffering from depression and anxiety related to crowds, arising from his experiences in Kaduna during the 2000 riots. Whilst there is some medical evidence[2] to support this assertion, there is no country background material to suggest that he would be more likely to encounter crowds in his place of residence in Nigeria than he would in Dagenham, where he currently lives. Nor does the scant medical evidence before me suggest that his condition would be worsened by return to Nigeria. None of these factors therefore attracts any material weight when considering the question of "very significant obstacles".

11. The central difficulty that the Respondent points to in respect of his reintegration into Nigerian society is the fact that he is HIV+. The Respondent's oral evidence was that the hospitals in Nigeria are effectively empty buildings and that he would not be able to receive any treatment. Ms Wortley did not pursue this line in her submissions and was wise not to do so. The Secretary of State relies on a document entitled "Country Information and Guidance *Nigeria: Medical and Healthcare Issues*" published by the Country Information Unit in May 2015 which states [at 2.3] that Anti-Retroviral Therapy is "available free to eligible patients in almost all public hospitals in Nigeria. For example in Lagos state there are 57 free HIV counselling and testing sites run by the government, civil society and the private sector…". The document provides a list of the ART drugs available in Nigeria. In light of that evidence I cannot be satisfied that the Respondent would be unable to access the medication that he needs to stay well.

12. Having taken all of those matters into account I cannot be satisfied, on the balance of probabilities, that the Respondent meets the requirements of paragraph 276ADE(1)(vi) of the Rules.

Article 8

13. The Respondent has not been able to meet the requirements of the Rule relating to private life. As for family life under the Rules, as set out in Appendix FM, it has been conceded that he cannot get a claim off the ground, since he cannot show himself to

[2] A support worker from 'Body and Soul' reported in November 2013 that the Respondent had been referred to a psychologist; on the 16th April 2014 North East London Mental Health services wrote a letter to the Respondent's GP confirming that he had reported symptoms of depression and anxiety. There is no formal diagnosis provided; nor is there any evidence from a psychologist.

be a 'partner' and so cannot meet the relationship requirements. The term 'partner' is defined at GEN.1.2 of Appendix FM:

> GEN.1.2. For the purposes of this Appendix "partner" means-
>
> (i) the applicant's spouse;
>
> (ii) the applicant's civil partner;
>
> (iii) the applicant's fiancé(e) or proposed civil partner; or
>
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application,
>
> unless a different meaning of partner applies elsewhere in this Appendix.

14. The Respondent has not married P. Nor has he entered into a civil partnership with her. They have never lived together. Although both he and P indicated that they did hope to live together in the future there has been no formal engagement and so he cannot be considered to be a fiancé.

15. The fact that the Respondent cannot bring himself within the Rules is a matter relevant to my consideration of Article 8. That is because the Rules, as they are currently formulated, provide an expression of where the Secretary of State considers the balance to be struck, and provide a focused analysis of the relevant factors[3]. I am entitled to adopt a two-stage process, considering first the Rules and then *Razgar* Article 8[4], but in doing so I need not cover the same ground. As Underhill LJ puts it in Singh and Khalid [at 64]:

> "… there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

16. Ms Wortley submits that in this case the particular nature of the Respondent's relationship with P and her children means that the case as it stands 'outside of the Rules' is substantial. Although he has been in a serious relationship with P for approximately five years it is not one that can be brought within the Rules *inter alia* because of the restrictive definition of 'partner' at GEN.1.2. Mr Clarke agreed that this was so. Although the Respondent does not fall under any of the four categories set out at GEN.1.2, Mr Clarke accepted that there is a 'family life' with P and her children such that Article 8 would be engaged.

17. The evidence was that P lives in Glasgow with her daughter C1 (who is now an adult) and her son C2 (aged12). She also lives with, and cares for, her elderly father who has a number of illnesses, largely relating to his heart. The Respondent continues to live in Dagenham where has been told to remain by immigration services and where he is able to comply with the reporting restrictions attached to his

[3] See for instance Sales J (as he then was) [at 29 of] R (Nagre) v SSHD [2013] EWHC 720 (Admin), Beatson LJ [at 40] in Haleemudeen v SSHD [2014] EWCA Civ 558

[4] MF (Nigeria) v SSHD [2013] EWCA Civ 1192, Singh and Khalid v SSHD [2015] EWCA Civ 72

immigration bail. They manage to see each between 3-4 times per month. He travels to Glasgow to see her and sometimes she comes down. She describes the Respondent as a "very kind person" who gives her a lot of support. When they are not together they speak by telephone, often every day. They want to live together permanently but at present are prevented from doing so by circumstance. I heard impressive and persuasive evidence from C1. She told me about how her little brother has suffered from racially-motivated bullying at school in Glasgow and how the Respondent has supported the family through this. It has necessitated C2 moving schools. The Respondent has been able to talk to C2 and provide him with guidance. The children have not had any contact with their birth father for about 9 years. C1 told me that the Respondent has "helped her a lot" and is "generous and friendly". She thinks of him as her father and has no contact with her own. I accept that there is a genuine and substantial commitment between the Respondent and P such that they can be said to share an Article 8 family life. I am further satisfied that his relationship with C1 and C2 could be said to fall under the rubric of the Article.

18. The Respondent's removal to Nigeria would interfere with the family life he shares with P and her children. I find as fact that she will not travel to Nigeria because of her commitment to caring for her father. Although much of the relationship is conducted by telephone and in that respect could be expected to continue, an important aspect of this family life is the weekly direct contact that the parties enjoy with each other. This would not be possible between Glasgow and Nigeria on a regular basis.

19. The decision is one that was lawfully open to the Secretary of State to take and I accept that the removal of persons without a right to remain in the United Kingdom under the Rules is rationally connected to the legitimate Article 8(2) aim of protection of the economy.

20. In considering proportionality I must have regard to all of the factors set out in s117B:

> **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.

21. The maintenance of effective immigration controls is in the public interest. This Respondent arrived in the UK as a visitor in 2002, and made an asylum claim which was found to be without merit. In 2004 he made a further claim for asylum, which was again rejected. This was a decision upheld by the First-tier Tribunal. The Respondent has not at any time had leave to remain.

22. The Respondent speaks fluent English. This is not therefore a factor that weighs against him.

23. There is no evidence that the Respondent has ever had any recourse to public funds to which he was not entitled. I accept his (oral) evidence that if allowed to remain in the United Kingdom he would work and provide for himself and his family. I give no positive weight to the fact that the Respondent has already been working in the United Kingdom since he never had the requisite permission to do so.

24. The Respondent has been in the UK since 2002. That is a long time and I accept that during that time he will have developed a private life. There was some evidence of this before me in the form of letters from his counsellor at 'Body & Soul' and his doctors. He attends church and receives support from friends living in the United Kingdom. It is however the case that during the entire time that he was here his immigration status was either "precarious" or "unlawful". As such I should attach only little weight to that private life.

25. It has been accepted that the Respondent has a family life in the UK but that too has been established when his status was unlawful. As such I should attach little weight to it.

26. Having had regard to all of these factors I further consider the submissions made on the Respondent's behalf. I accept that his relationship with P, as presently constituted, would break down if he were to be removed. I am not however satisfied that this would result in a violation of the United Kingdom's obligations under Article 8. There is a family life in this case, but it is not – at present - a family

life of such substance that an interference with it could be said to be disproportionate. The parties to this relationship are committed to each other but not to the extent that they are willing to rearrange their lives to live together. The Respondent told me that he could not move because of his signing-on requirements at Becket House but admitted that he had made no enquiries about having his place of reporting moved to Glasgow. They hope to live together in the future but appear to have made no preparations for doing so, nor even have they made any tentative plans. I accept that both P and the Respondent would like the relationship to continue if possible, but I am not satisfied that their separation would have unjustifiably harsh consequences for either of them. I do not doubt that the Respondent's removal would be upsetting for the children but it could not be said to be to their detriment to the extent that the need to maintain immigration control is outweighed. As I have set out above the matters set out in section 117B do not lend support to the Respondent's case. In all the circumstances I am not satisfied that the Respondent's claim under Article 8 'outside of the Rules' can succeed.

Decisions

27. The determination contains an error of law and the decision, insofar as it relates to Article 8, is set aside.

28. I re-make the decision in the appeal as follows:

"The appeal is dismissed on protection grounds.

The appeal is dismissed under the Immigration Rules.

The appeal on human rights grounds is dismissed."

29. In view of the fact that this appeal raises health issues and concerns a minor I am satisfied, having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: *Anonymity Orders* that it would be appropriate to make a direction for anonymity and do so in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Respondent (Appellant) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both parties. Failure to comply with this direction could lead to contempt of court proceedings".

Deputy Upper Tribunal Judge Bruce
8th August 2015