Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12831/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 July 2015	**On 14 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE OF THE HOME DEPARTMENT

Appellant

and

MS ADETUTU HAIRAT BALOGUN
(ANONYMITY DIRECTION NOT MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr S Kandola, Specialist Appeals Team
For the Respondent/Claimant: Ms Celia Record, Counsel instructed by Direct Access

DECISION AND REASONS

1. This is the resumed hearing of the claimant's Article 8 appeal following an error of law hearing at Field House on 20 April 2015, and my error of law decision and reasons which were promulgated on 1 May 2015. I found that the First-tier Tribunal had erred in law in allowing the claimant's appeal against the decision to refuse to issue her with a residence card as an OFM, and I further found that her appeal under the 2006 Regulations

should be dismissed. I directed a further hearing to determine the claimant's alternative claim under Article 8 ECHR.

2. The appellant was called as a witness. She lived with her brother and sister-in-law, Naimat. She worked for an agency but she could not recall the name of the agency. Naimat was at work now. She could not get off work in order to come and give evidence today. She worked at a care home.

3. In cross-examination she said that she had not always lived at the same address with her brother and sister-in-law. In 2010 they lived in Tilbury, where they had been since 2008. They moved to Dagenham in 2011, and then to Romford in 2012. They were always living in rented accommodation. She was not on the tenancy agreement as she did not have a passport. She had submitted her Nigerian passport to the Home Office in 2012, and they had moved to Romford in 2013 (not 2012 as she had mistakenly said earlier). She asked why therefore she was not on the tenancy agreement in Dagenham when she still had her passport. She said they were not the only ones there. It was shared accommodation. She had not returned to Nigeria after her brother's wedding because she had discovered she was pregnant. She thought that she was six weeks' pregnant when she miscarried in April 2010. The appellant became tearful at this point in her evidence.

4. Before she came here, she lived with her mum. She was now living with one of her sisters in Lagos.

5. She would work in the UK, if she had status. She would like to be a childminder or to work in a hospital with children. She had never worked before. She was asked why she delayed until 2012 before attempting to regularise her status. The appellant said she was always home alone, and she again became tearful.

6. The claimant's brother, Olalekn Fadeyi, was brought into court to give his evidence. He adopted as his evidence-in-chief his witness statement dated 8 May 2013. His mother and step-father divorced when Adetutu was in primary school. He used to send money to Adetutu, and Naimat did as well. They supported Adetutu because they wanted her to go to university. At the time he was working as a mortgage specialist, and so he and Naimat could afford to support Adetutu.

7. Ms Record asked Mr Fadeyi what would happen if she went back to Nigeria. He said that they would continue to support her in Nigeria, and they would invite her to come back here. He was working as a development researcher. His wife also worked, but he did not know the name of the agency for which she worked.

8. In cross-examination, he said that his sister graduated from university in Lagos with a degree in industrial and labour relations. In answer to questions for clarification purposes from me, he said that this course of study gave rise to the following possible career paths: working as an arbitrator, working for a government department, or working as a

consultant. But she would have more opportunities in the UK than she would in Nigeria.

9. In his closing submissions on behalf of the Secretary of State, Mr Kandola referred to Section 117B of the 2002 Act, and said there were more adverse factors in play than there were positive factors. The claimant had established private life here unlawfully. There was no **Kugathas** dependency. She was forced to rely on the support of her brother and sister-in-law due to her illegal status. She was capable of working, and she wanted to work. She could apply for a job in Lagos.

10. In reply, Ms Record referred me to her skeleton argument. She submitted that this was an exceptional case. The claimant had an established family and private life with her brother and sister-in-law, and lived as part of their family. Although she did not meet the letter of the Rules, the Tribunal was asked to apply the reasoning in **Gulshan [2013] UKUT 640 (IAC)**. After applying the requirements of the Rules only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised by them. In this case, there was a compelling circumstance, which was that the claimant had lived as a dependant on her brother and his wife prior to entering the UK, and after entering the UK. She was an overstayer, not an illegal entrant. She would be returned back to Nigeria, and she would still remain dependent on her brother and his wife, and so would satisfy the Rules for re-entry under Regulation 8(2).

11. The only reason why the claimant did not meet the 2006 Regulations was because she had entered before her brother's marriage, rather than after her brother's marriage. So she had missed meeting the Regulations by a matter of days or weeks.

Discussion and Findings

12. Mr Kandola did not specifically challenge the case advanced by the claimant that she was financially dependent on her brother and sister-in-law before she arrived in the United Kingdom on a visit visa. It is reasonable to question whether the Entry Clearance Officer would have granted the claimant entry clearance if the claimant had presented herself in her application form as a dependant of her UK sponsors, as opposed to leading an independent life in Nigeria and thereby having an adequate incentive to return to Nigeria on completion of a short family visit. But even if it is assumed in the claimant's favour that she was financially dependent on her brother and sister-in-law before she came here, she does not come within the scope of Regulation 8(2) for the reasons given in paragraph 18 of my error of law decision.

13. Accordingly, the necessary starting point is that the claimant is not entitled to remain in the United Kingdom under the Regulations, and nor does she have any entitlement to remain in the United Kingdom under Appendix FM or Rule 276ADE.

14. Given her length of residence in the United Kingdom, I accept that questions 1 and 2 of the **Razgar** test should be answered in her favour with regard to the establishment of private life here. The claimant was born on 30 April 1985, and she is thus now 30 years of age. She is a university graduate, and with her degree she is capable of working at a managerial level. Although there has been de facto dependency on her brother and sister-in-law in the United Kingdom, this has come about because of her illegal status as an overstayer and not because of any inherent inability on her part to lead an independent life. Accordingly, insofar as it is material, I do not consider that the claimant should be treated as having established family life in the UK with her sponsors. But even if I am wrong about that, it does not have any material bearing on the issue of proportionality, as is illuminated in the analysis conducted by Sir Stanley Burnton in **Singh v Secretary of State for the Home Department [2015] EWCA Civ 630** at [25]. It is not the label of family or private life which matters, but the underlying realities. The appellant is a healthy and well-educated adult, who does not have any particular vulnerability and who is not shown to have an emotional dependency on her sponsors which goes beyond the normal emotional ties to be expected between close family members who are all adults (but who are not related to each other as husband and wife).

15. Questions 3 and 4 of the **Razgar** test fall to be answered in favour of the Secretary of State, and on the issue of proportionality, the public interest considerations are, as Mr Kandola submitted, heavily weighted against the claimant. It is in her favour that she speaks good English. But she is not financially independent, as she is not allowed to work, and she has built up her private life in the United Kingdom unlawfully since her visit visa expired. There are not significant obstacles to her re-integration into life in Nigeria. She will have the financial support of her brother, and she will enjoy family reunion with her mother.

16. Ms Record submits that it is disproportionate to require the claimant to go back to Nigeria, as she would be able to re-apply immediately for entry clearance under the Regulations. I am doubtful about this, as there would be no nexus between her asserted dependency and the exercise of free movement rights by her brother. Also, as a putative OFM she would not have an automatic right of entry. She could be refused entry on discretionary grounds under Regulation 17(4).

17. But even if Ms Record is right, it would not militate against the proportionality of the refusal decision for two reasons. Firstly, the effect of the refusal is simply that the claimant is not given a residence card. She is not facing a removal decision. Secondly, it is in the public interest that those who are present in the United Kingdom unlawfully should voluntarily return to their country of origin rather than remaining here unlawfully. This is a desirable end in itself to encourage compliance with the Rules. It matters not that in some cases the person concerned may be eligible to apply for entry clearance from the country of return.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: this appeal is dismissed under the Regulations and under Article 8 ECHR.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson