IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/27046/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1st September 2015	**On 15th October 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KENE CHARLES GEORGE
(ANONYMITY DIRECTION NOT MADE OR REQUESTED)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Presenting Officer
For the Respondent: The Respondent in person

DECISION AND DIRECTIONS

1. The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal (Judge Symes) who, in a determination promulgated on 18th March 2015, allowed the appeal of the Respondent against the decision of the Secretary of State to refuse his application for leave to remain and to set removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. Whilst the Secretary of State is the Appellant, I propose to deal with the parties as they were before the First-tier Tribunal.

3. The Appellant is a citizen of Nigeria born on 10th November 1966.

4. The Appellant's immigration history is set out in the determination of Judge Symes at paragraphs [2] to [3] of the decision. He first entered the country on a student visa from 29th December 2003 valid until 31st December 2006. His leave was then extended until 31st October 2008. An application under the Tier 1 (Post-Study Work) route was refused and a subsequent appeal was dismissed on 30th March 2009 with all appeal rights being exhausted on 7th April 2009. He made a further application of student leave which was granted from 28th July 2009 until 18th October 2009, and then as a Tier 1 (General) Migrant until 24th September 2011. An application outside the Rules was made on 17th September 2011 and refused on 12th November 2011, the subsequent appeal succeeding on 31st January 2012.

5. Thus the Appellant was granted discretionary leave to remain from 29th March 2012 until 4th May 2014 so that he could finish his training with Woodford Wise Solicitors.

6. The application for indefinite leave to remain on long residence grounds was made on 20th November 2013 and refused on 26th March 2014 without a right of appeal as at that time the Appellant still had leave to remain. Consequently the application that gave rise to this appeal was made on 12th April 2014, by which time its refusal left him without leave and with a right of appeal.

7. The decision of the Respondent was made on 19th June 2014. It set out the immigration history that I have set out above and when considering discretionary leave noted that the period between 2012 to 2014 had been granted so that he could finish his training with Woodford Wise Solicitors and, as he had finished that training, the Secretary of State was not satisfied that the grounds under which he was previously granted discretionary leave still persisted, thus the application for further leave was refused.

8. As to his application on long residence grounds, the decision letter stated that any overstaying of 28 days or less would be disregarded, as would any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period. However, the Secretary of State considered that the period between 7th April 2008 and 16th June 2009 was such that he did not have valid leave and was therefore a break in residence and discretion could not be applied to the break in residence as the reason given was not deemed to be exceptional. Consequently, as he had not spent ten years of continuous lawful leave in the United Kingdom he could not meet the requirements of the Rules.

9. The decision of the Secretary of State led to an appeal before the First-tier Tribunal (Judge Symes) on 25th February 2015. At that hearing, as the judge recorded, the Secretary of State did not appear nor was represented and the Appellant attended in person. The judge set out his evidence at length at paragraphs [8] to [13] and it is

plain from reading the decision of Judge Symes that not only was no challenge made to the truthfulness of the Appellant's account in the refusal letter but that in any event it was "inherently credible and plausible" and he accepted the Appellant's account as the factual basis for considering his assessment of the appeal.

10. At [16] the judge reached the conclusion that he could not succeed under the Immigration Rules either under the long residence or private life route because there was a break in the Appellant's period of lawful residence. He also found that whilst the Respondent had a policy outside the Rules it was not exercisable on appeal (Section 86(4) of the Nationality, Immigration and Asylum Act 2002). Furthermore, as to paragraph 276ADE of the Rules, he had continuing social, cultural and family ties in Nigeria and thus could not satisfy the Rules [16].

11. At paragraphs [17] to [25] the judge considered the appeal outside of the Rules and at [17] placed weight on the fact that the Appellant could not meet the Immigration Rules. He made self-directions as to the law from paragraph [17] to [19] of the determination and in relation to the class of cases relating to those who had entered the United Kingdom as students and had wished to remain, the judge at [20] directed himself that the mere fact that a person may have entered the country and embarked on a course of studies did not necessarily mean that they would have established a private life, particularly once they had finished their course. The judge found that the Appellant's circumstances were "readily distinguishable from the **Nasim** class of case" and gave reasons for that at [20], noting that the Appellant had "a relatively long period of residence" and that he had only failed to qualify for the long residence route under the Rules through a "chance event" in that the former Sponsor lost her ability to issue an effective CAS over a period during which he needed to apply for further leave to remain. The judge cited the decision of **Ferrer (limited appeal grounds; Alvi) Philippines [2012] UKUT 304 (IAC)** at [57], that "issues of fairness can have a material part to play in determining the proportionality of giving effect to an immigration decision, which interferes with a person's private and/or family life in the United Kingdom". Applying that decision, the judge reached the conclusion that the unfairness of the outcome that resulted in this particular Appellant's case was due to difficulties suffered by his Sponsor in circumstances where they "nevertheless retained their licence so that the various policies that the Respondent has had over time to ameliorate the impact of revocation or suspension of Sponsor licences were not available to him", he found that that was relevant in the sense referred to in the decision of **Ferrer**.

12. At [21] he placed in the balance that the Appellant had made a very significant investment in his studies over an extended period, that he was closely connected to the United Kingdom having studied beyond degree level in a very particular professional context (that is the law). He had worked in the UK and had volunteered; he had numerous close friends including members of the legal profession who had mentored him in the UK for a lengthy period. He found him to be close to the family of Mr Quinn and he concluded that that evidence represented a "significant part of his personal identity in the sense identified in the decision of **Niemietz**". Furthermore, he observed that his choice to remain here based on his

own private life rather than relying on what appeared to be a "promising alternative application under the partner route with a British citizen girlfriend with whom he has been in a lengthy relationship" attested to the extent that he identified with his life in the UK. He found that to be contrasted to the situation in Nigeria where he had no close relatives and to where he did not even feel it necessary to return to attend the funerals of his parents.

13. Consequently he did find that private life was well established and that there would be an interference with it. When considering issues of proportionality at paragraph [22] onwards, the judge took into account the statutory factors under Part 5A and Section 117 and applied those paragraphs substantively at paragraph [23] of the decision. He found that the Appellant had been present lawfully for nearly all of the time in which his private life had been established; his sole break in leave to remain was attributable to events beyond his own control and he found that in the early days of the points-based system it was likely that the complexity of the new provisions might have led to confusion as to the success of a particular kind of application which had led to the Appellant making an application which was doomed to fail when he sought to extend his Tier 4 leave thereafter, having enjoyed an extension of leave to remain because of Section 3C of the Immigration Act 1971 until April 2009. He found the application was frustrated by the Sponsor's difficulties with issuing a CAS at the required time. He further concluded that he did not see it as any "answer to his case" to say that at that moment he should have gone elsewhere to find an educational Sponsor who could issue him with a CAS; he was at that moment at a very advanced stage of his studies with a reputable and well-known educational establishment and was more than three quarters of the way through a course for which he had paid a very significant fee. He found that the Appellant was no burden on the taxpayer and spoke very good English (117B(2)(a)). Thus at [25] he reached the decision when applying the balance of proportionality that the balance was in favour of the Appellant and allowed the appeal on Article 8 grounds.

14. The Secretary of State sought permission to appeal that decision and permission was granted on 8th May 2015.

15. Thus the appeal came before the Upper Tribunal, Mr Whitwell on behalf of the Secretary of State relied upon the grounds. As to Ground 2, he submitted that the judge failed to direct himself as to the correct standard of proof and that as he did not refer to it in his determination it constituted a material error of law.

16. As to Ground 1 and the balance of proportionality, he made reference to the applicant's history and that the Appellant had made a Tier 1 Post-Study application in 2008 as he wished to pursue a training contract which he could not do on a Tier 4 visa but when that application was refused he sought to extend a Tier 4 visa but could not do so because the University of Westminster was unable to issue him a CAS. Thus it was submitted that the judge was incorrect in finding that there were any issues of unfairness that arose in the current appeal. He chose to make an application in 2008 which was unsuccessful and that, as they were choices open to

the Appellant, no issues of unfairness were raised. Thus he submitted the judge had focused on the issue of unfairness but there was no procedural unfairness demonstrated and that Article 8 was not a "general dispensing power" for those who were unable to meet the requirements of the Immigration Rules. He relied upon the decision of **Nasim** at paragraphs [39] and [42] and that the Appellant was in the United Kingdom for a temporary purpose to study and to qualify as a solicitor and thus the decision of the judge at paragraph [20] of the determination was wrong in that respect and that there was no "chance event" as the judge recorded nor was there any form of unfairness.

17. He also submitted that the proportionality assessment was flawed as the judge failed to take into account at [23] Section 117B(5) that little weight should be given to a private life established by a person at a time when the person's immigration status was precarious. In this sense relying upon the decision of the Tribunal in **AM (Section 117B) Malawi [2005] UKUT 260 (IAC)**. He accepted that at paragraph [22] the judge did quote and take into account Section 117B(1) that the maintenance of immigration control was in the public interest. Thus he submitted the judge's assessment of proportionality was flawed and should be set aside.

18. Mr George represented himself. For the purposes of the appeal, he had provided a written response to the application for permission to appeal made by the Secretary of State dated 20th May 2015. In that document, which he adopted as his submissions before this Tribunal, he set out in detail the immigration history that had led to the judge's conclusions and in particular highlighted the problems that had arisen relating to the CAS which had caused problems not only for him but for a number of other bona fide students and that the delay that caused the break in residence was not attributable to any of his own conduct. He reiterated that there was an issue of unfairness and that this was a relevant consideration that the judge was entitled to take into account when reaching a decision. The document went on to set out the legal principles relating to private life in the United Kingdom and he submitted that it was open to the judge to find that he had lived in the UK for more than eleven years and that the judge applied and gave appropriate weight to the public interest requirement at paragraphs [19] to [23] of the determination. He further submitted at paragraph [11] of the document that the judge applied the relevant standard of proof to the findings of fact and also observed that the Respondent had not sought to challenge any of those factual assertions either in the refusal letter or before the First-tier Tribunal.

19. His oral submissions echoed those set out in the document.

20. I reserved my determination.

21. In dealing with Ground 2, the Secretary of State submits the judge failed to identify the relevant standard of proof, which would have been the balance of probabilities, when making the findings of fact. That ground is simply not made out. It is plain from reading the determination, and also the documents within the Respondent's bundle, that no challenge was made to the Appellant's factual account. Indeed the

Secretary of State did not attend before the judge to challenge any of his factual account and it was fully open to the judge in those circumstances to reach the conclusion that he had found the Appellant's account to be "credible and plausible" and thus accepted wholeheartedly and without reservation the factual account that was given by the Appellant in the preceding paragraphs of the determination at paragraphs [1] to [14]. In reaching those findings of fact there is no hint of any kind that the judge applied the wrong standard of proof and therefore I do not consider that that ground is made out.

22. Dealing with the other issues raised and in particular the judge's reliance on the issue of fairness, I have considered the factual circumstances. The Secretary of State submits that the Appellant chose to make a Tier 1 application in 2008 to pursue a training contract. The history demonstrates that he graduated in June 2007 and enrolled on the LPC course in September of that year. The application was lodged on 27th October 2008 as a Post-Study Migrant to pursue a training contract. The Appellant in a letter stated that this was a trainee solicitor vacancy that was coming available in August 2009 and he was required to show that he would be eligible to work full-time which is why the Tier 1 application was lodged. The explanation for not succeeding was that he had graduated in 2007 and having lodged the application in October 2008 could not score points under the Immigration Rules because he was required to lodge the application within one year of graduation. Whether or not the application was rejected because he had been given the wrong advice by an immigration advisor, it is plain that he could not meet the Immigration Rules as a Post-Study Migrant. He did have an appeal before a judge and that was dismissed. The decision was not put before the First-tier Tribunal nor has it been put before this Tribunal. Therefore, the Respondent is right to assert that it was on the evidence the Appellant's choice in 2008 to pursue a training contract and when he was unsuccessful he chose to continue his study. The Appellant then went on to continue with his studies after that time.

23. Consequently the factual circumstances surrounding the Tier 1 application and the lack of success could not and does not raise any issue of unfairness in my judgment. In this respect I find the Secretary of State is correct. However, the events that the First-tier Tribunal Judge identified that gave rise to the unfairness arose after this stage. Following the application made as a Tier 1 Migrant which had been dismissed by the First-tier Tribunal on 30th March 2009 he had 28 days to provide a further application. It is common ground that no application was made until 16th June 2009. I observe at this stage that the decision letter was wrong in its contents when it made reference to the break in residence as the Appellant properly pointed out in his written evidence, the break in residence was not from April 2008 but from April 2009 until 27th July 2009. The judge accepted the explanation for the delay over that period which was following the appeal in March 2009 he had approached the University of Westminster for a sponsorship letter (see the evidence at [f] in the determination). The judge considered this at [20] noting that his case could be distinguished from the case of **Nasim** because he had a "relatively long period of residence here; indeed he has only failed to qualify for the long residence route under the Rules through a chance event, in that his former Sponsor lost their ability

to issue an effective CAS over a period during which he needed to apply for further leave to remain". The judge went on to consider the decision in **Ferrer (limited appeal grounds; Alvi) Philippines [2012] UKUT 304 (IAC)** at [57], quoting the following:-

> "Issues of fairness can have a material part to play in determining the proportionality of giving effect to an immigration decision, which interferes with a person's private and/or family life in the United Kingdom."

24. Thus applying that decision he found the issue of unfairness that had resulted from the particular circumstances of this Appellant's case were difficulties suffered by the Sponsor and thus not at the hands of the Appellant and the Sponsor's circumstances were such that they had retained their licence but that the various policies that the Respondent had over the time to ameliorate the impact of suspension of Sponsor licences (which was the evidence before him relating to the university) was a relevant consideration in the sense referenced in the decision of **Ferrer**. I do not consider that the submissions made by the Secretary of State demonstrate that the judge wrongly applied the decision of **Ferrer** and whilst it is right to submit that Article 8 is not a general dispensing power for those who are unable to meet the requirements of the Immigration Rules, that misrepresents the decision of the judge and his reasoning as to why he found there was an issue of fairness which was an issue of procedural fairness that resulted in an outcome that the Appellant had no control over.

25. He expressly considered at [20] the policies that the Secretary of State subsequently applied to Appellants who had been in a similar position to this Appellant where licences had been revoked and this had been taken into account so that applicants were able to have a period in which they could obtain CAS documents from alternative establishments. That was not applicable to this Appellant at the time and it was this that the judge went on to consider and take into account in the proportionality balance at [23] when the judge made reference to the "complexity of the new provisions".

26. Whilst the Secretary of State submits that the Appellant, having then chosen to pursue a Tier 4 application and the fact that the University of Westminster was unable to issue a CAS did not raise an issue of unfairness as his Tier 4 application was ultimately successful later on, that misses the point. The judge found on the evidence that he had wholly accepted, and to which there has been no challenge, that the applicant had been in a position to extend his leave as a Tier 4 student but that it was frustrated by the Sponsor difficulties with issuing a CAS at the required time due to no fault of the Appellant for the reasons I have already referred to and where the judge had stated at [23] and that it was no answer to say that he could have gone elsewhere to find an educational Sponsor as he was at an advanced stage in his studies with a reputable, well-known educational establishment. Indeed the documents provided show what was outstanding was the competency assessment which was necessary to provide him with a pass for the LPC course (see the documents appended to the application).

27. Furthermore, the fact that his Tier 4 application was successful with leave being granted between July 2009 and 18th October 2009 demonstrates that if the Sponsor had not had the problems that had been outlined, for which the Appellant could not be blamed for or held responsible, the likelihood is that he would have succeeded and thus there would not have been the break in leave which ultimately led to his application for long residence failing.

28. In essence, the judge was not seeking to allow the appeal on Article 8 grounds based solely on the issue of fairness or, as Mr Whitwell submits, a "general dispensing power" but for the reasons given that the Appellant had not been able to satisfy the Immigration Rules and the reason for that was a matter that in the judge's assessment weighed heavily in the proportionality balance that he undertook alongside the others matters identified by the judge, including the strength of his private life and the matters referred to .

29. The grounds advanced on behalf of the Secretary of State also refer to the judge's failure to apply the statutory requirements contained in Part 5 and Section 117B. It is accepted by Mr Whitwell that the judge did take into account at paragraph [22] Section 117B(1) that the maintenance of effective immigration control was in the public interest but he submits that the judge did not take into account Section 117B(5) on the basis that his stay in the United Kingdom was "precarious" and that that was a factor missing from the proportionality balance.

30. Section 117A(3) confirms that the Tribunal is required to carry out a balancing exercise where a person's circumstances engage Article 8(1) to decide whether the proposed interference is proportionate in all the circumstances. Section 117B sets out the public interest considerations to apply and Section 117C sets out the additional considerations in cases involving foreign criminals, which clearly do not apply to the particular facts of this appeal.

31. The judge properly had regard to the factors at [22] and [23] and made express reference to Part 5A. The judge was entitled to rely upon the findings of fact that he had made in the earlier part of the determination relating to the Appellant's private life. He identified that private life was properly engaged under Article 8(1) for the reasons he gave at [21] which are not challenged by the Secretary of State and thus turned to the issue of proportionality and took into account the statutory considerations set out under Section 117B. The facts as the judge found them to be at [24] were directly referable to Section 117B and that it was in favour of the applicant and that it was in the public interest and the interests of the economic wellbeing of the United Kingdom, the ability to speak English and this Appellant was also financially independent (Section 117B(3)). The judge also found that the Appellant had been lawfully in the United Kingdom for nearly all of the time, applying Section 117B(4)(a) and that the only break referred to was the short period in the summer of 2009. It is right that the judge did not expressly take into account that the basis of his stay was precarious. In this context Mr Whitwell relies on the decision of **AM (Section 117B) Malawi [2015] UKUT 260 (IAC)**. The judge did not have the benefit of that decision as it was not promulgated until well after the hearing. The

decision makes it plain that Parliament has drawn a strong distinction between any periods of time during which a person has been in the UK unlawfully and periods of time in which the person's immigration status was "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. Consequently, whilst the judge found that the applicant's private life had accrued at a time when he had been lawfully in the United Kingdom and did not expressly refer to it as "precarious" in the sense identified in the decision of **AM**, the grounds do not demonstrate that this would have affected the balance of proportionality reached by the judge or, to put it another way, that that factor would have outweighed the other factors which cumulatively weighed in the balance in favour of the Appellant. The considerations whilst expressed in mandatory terms are not expressed as exhaustive (see the phrase "in particular" Section 117A(2) and see the decision of **Forman (Section 117A-C considerations) [2015] UKUT 0412)** and the Tribunal was entitled to take into account additional considerations if relevant if they bear on the public interest question. It is plain that in this context the judge took into account that the break in leave was attributable to an event for which this Appellant was not responsible [23] and his continuing reference to the points-based system as described by the Court of Appeal in **Pokhriyal v SSHD [2013] EWCA Civ 1568** and this was a consideration the judge was entitled to take into account in the balancing exercise.

32. Consequently the Secretary of State has not demonstrated that in light of the factors that the judge found to weigh heavily on the side of the Appellant that this would have led the judge to have reached any other decision on the issue of proportionality and therefore was not material to the outcome. Therefore I am satisfied that the factors that the judge took into account when considering the issue of proportionality were relevant considerations and that the weight given by the judge to those factors was a matter for the judge when considering the particular factual circumstances of this appeal that was before him. Whilst it might be characterised as a generous decision, the grounds do not demonstrate that the decision was not within the range of reasonable decisions open to the judge on the particular factual circumstances that this judge found. For those reasons, the Secretary of State has not demonstrated that the decision of Judge Symes was flawed in law and therefore the appeal of the Secretary of State shall be dismissed. The decision to allow the appeal made by Judge Symes shall stand.

Notice of Decision

The decision of the First-tier Tribunal shall stand; the appeal by the Secretary of State shall be dismissed.

No anonymity direction is made and none has been requested.

Signed Date

Upper Tribunal Judge Reeds