The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: IA/30658/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2016	**On 21 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MS AUGUST TOCHUKWU OJIYI
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
Appellant Mr Sellwood, Counsel, instructed by Debridge Solicitors
Respondent Mr Stanton (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant is a citizen of Nigeria. The appellant came to the United Kingdom as a student on July 22, 2008. She was allowed to extend that leave until September 28, 2009 and thereafter she was granted post-study leave until September 2, 2011. On August 16, 2011 she applied to remain on article 8 ECHR grounds but this was refused and her appeal was dismissed by the First-tier Tribunal on November 11, 2011 with appeals rights exhausted on December 23, 2011. The appellant asked for reconsideration on January 26, 2012 and was later served with Form IS151A on October 16, 2002. The respondent considered her request and on July 12, 2014 refused her application.

2. The appellant appealed this decision on July 24, 2014, under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

3. The appeal came before Judge of the First-tier Tribunal JHH Cooper on May 29, 2015 and in a decision promulgated on June 23, 2015 he/she refused the appeal under the Immigration Rules and article 8 ECHR.

4. The appellant lodged grounds of appeal on July 7, 2015 submitting:

   a. The Judge had erred by conflating the tests for Section EX.1 of Appendix FM of the Immigration Rules and article 8 ECHR.

   b. The Judge failed to have regard to the medical evidence.

   c. The Judge failed to consider the appellant's extensive private life.

5. Judge of the First-tier Tribunal Simpson gave permission to appeal particularly with regard to the Judge's approach to article 8 ECHR.

6. The matter came before me on the above date and I heard submissions from both representatives.

7. Mr Stanton, having heard Mr Sellwood's submissions, accepted there was an error in law in respect of grounds one and three of the grounds of appeal and that the matter should be reheard. He disputed any error in so far as ground two was concerned and invited me to preserve that finding.

8. Mr Sellwood invited me to find an error in law on all grounds. He submitted the Judge's approach to Section EX.1 of Appendix FM was flawed because he had intertwined his findings with his article 8 assessment. In particular, he submitted the Judge's approach in paragraphs [38] and [39] demonstrated an error in approach because the Judge highlighted the approach in Chikwamba v SSHD [2008] UKHL 40 which is a case relevant to article 8 only. The Judge erred in his approach to article 8 ECHR because there was no proper proportionality assessment and in particular the Judge had no regard to the appellant's private life and the effect she had had on the local community. The Judge' approach on documents was also arguably flawed. Turning to the medical evidence he submitted the Judge's approach to the medical evidence was flawed and the finding should be set aside.

9. Having considered the submissions I agreed there was an error in law in so far as grounds one and three were concerned but found no error of law in respect of Ground two.

10. The Judge approached the Immigration Rules and article 8 ECHR as indicated in paragraph [37]. Although the courts have made clear that there is a two stage the Judge approached both issues as one and whilst I agree that factors in the Section EX.1 consideration are similar to those in article 8 ECHR the emphasis under the Rules is different to the approach under article 8 ECHR with the Tribunal considering whether there are insurmountable obstacles to family life continuing outside the United

Kingdom whereas article 8 ECHR is of course a consideration of the whole picture and whether it would be proportionate to remove the appellant. The Judge found it would not be reasonable to expect the sponsor to leave the country and return to Nigeria but failed to consider whether there were insurmountable obstacles to family life continuing outside the United Kingdom.

11. The Judge's approach to article 8 failed to have any regard to the appellant's private life. It may well be that it would be proportionate to remove her but as stated in Razgar [2004] UKHL 00027 the Judge must consider proportionality and he must now have regard to section 117B factors (contained in Section 117B of the 2002 Act). As Mr Stanton helpfully indicated the Judge failed to do this.

12. For the above reasons I find there was an error in law in respect of both the Immigration Rules and article 8 ECHR and I set aside those decisions.

13. As regards the Judge's approach to the medical evidence I do not find any error in the approach taken. Paragraph [41] makes it clear how the evidence was considered and in the absence of any material change in his circumstances I see no reason to re-visit that aspect of the case but ultimately that would be a matter for the Judge re-hearing this appeal. I merely make clear that the current medical evidence does not support any suggestion that the sponsor is in need of any real care bearing in mind he is able to work full-time as a taxi driver.

14. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

> "Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).
>
> The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

15. In light of the Practice Direction I agreed the matter should be remitted t back to the First-tier Tribunal.

16. It goes without saying that once that date has been fixed the appellant should serve on both the Tribunal and the respondent an updated bundle of evidence that is to be relied on.

DECISION

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I have set aside the decision.

18. The appeal is remitted back to the First-tier Tribunal for a fresh appeal hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

Signed: Dated:

Deputy Upper Tribunal Judge Alis