Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/33837/2014**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision & Reasons Promulgated**
On 4 March 2016	**On 24 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MONICA IJEMEH IKHILE

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright counsel instructed by Paul John & Co Solicitors
For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge J D L Edwards promulgated on 1 April 2015 which dismissed the Appellant's appeal against a decision to remove from the UK following the refusal of an application dated 26 March 2014 for discretionary leave to remain on the basis of family and private life.

Background

4. The Appellant was born on 18 May 1989 and is a national of Nigeria.
5. The Appellant arrived in the UK on 4 October 2006 with entry clearance as a student and this leave was extended until February 2013 as a Tier 1 HS Post study student.
6. On 13 February 2013 she applied for leave as Tier 1 Entrepreneur which was refused. The decision was appealed but permission was refused and the Appellant was appeal rights exhausted on 26 March 2014.
7. On 26 March 2014 the Appellant made the application whose refusal was the subject of this appeal.
8. It was conceded that the Appellant could not meet any of the requirements for leave under the Immigration Rules although these were considered in the refusal letter. The application for leave was on a discretionary basis under Article 8. The refusal letter stated that in essence there were no compelling circumstances in the Appellant's case that warranted a grant of leave outside the Rules.

The Judge's Decision

9. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Edwards ("the Judge") dismissed the appeal against the Respondent's decision. The Judge :
   (a) Set out the Appellant's immigration history against which the appeal was made.
   (b) Set out the applicable law that was considered by the refusal letter, both the Rules and Article 8 setting out in full the 5 questions posed in Razgar [2004] UKHL 2015.

(c) Summarised the evidence that she had come to the UK to further her education in 2006 and was joined by her parents in 2009; her parents her help with household duties as her mother had an arthritic knee and her father had hypertension and diabetes; she has performed a number of charitable works; she claimed to have no ties to Nigeria and would find difficulty in acquiring work or accommodation.

(d) He found that the parents were unimpressive witnesses and their dependency was exaggerated given that the mother worked part time and their health issues were the concomitants of old age.

(e) He found that she did have ties with Nigeria in that she relatives and her father had a pension payable there.

(f) She was young well qualified and intelligent and energetic and could easily reintegrate into Nigerian society.

(g) He concluded by noting that she had entered the UK on a temporary basis and he could find no compelling reasons not covered by the Rules that would warrant a grant of leave outside the Rules. The refusal was therefore proportionate.

10. Grounds of appeal were lodged suggesting that the Judge wrongly focused on paragraph 276ADE and failed to give adequate consideration to Article 8 outside the Rules; he failed to consider the evidence that there was a high level of co-dependency between the Appellant and her parents which constituted more than normal emotional ties for the purposes of Article 8(1); he made no assessment of the proportionality of the decision

11. Permission was initially refused but the application was renewed and on16 October 2015 Deputy Upper Tribunal Judge Chapman gave permission to appeal.

12. At the hearing I heard submissions from Mr Plowright on behalf of the Appellant that :

(a) The Article 8 assessment was very brief and was a short analysis that did not address all of the issues.

(b) The Appellants relationship with her parents was not properly addressed.

(c) There was a lack of reasoning in the assessment of family and private life and whether the Judge accepted there was family life for the purpose of Article 8.

(d) There was no basis to move onto proportionality.

13. On behalf of the Respondent Mr Mc Vitie submitted that :

(a) The decision was brief.

(b) How could this appeal ever have succeeded on the basis of compassionate features: there were no health issues; the Appellant was well educated; the only issue raised was a s to her parents' health but that was rejected.

(c) The Judge accepted there was family life but arguably could have stopped at stage 1 and no more analysis was required.

The Law

14. In relation to claims under Article 8 the Respondent considers these under Appendix FM and paragraph 276ADE of the Rules and the Secretary of State's Guidance. If an applicant does not meet the criteria set out in the Rules then guidance issued by the Secretary of State in the form of instructions provides in effect, that leave to remain outside the rules could be granted in the exercise of residual discretion in 'exceptional circumstances' which are defined in the guidance and must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2.

15. It is now generally accepted that the Immigration Rules Rs do not provide in advance for every nuance in the application of Article 8 in individual cases. At para 30 of Nagre, Sales J said:

"30. … *if, after the process of applying the new rules and finding that the claim for leave to remain under them fails, the relevant official or tribunal judge considers it is clear that the consideration under the Rules has fully addressed any family life or private life issues arising under Article 8, it would be sufficient simply to say that; they would not have to go on, in addition, to consider the case separately from the Rules. If there is no arguable case that there may be good grounds for granting*

leave to remain outside the Rules by reference to Article 8, there would be no point in introducing full separate consideration of Article 8 again after having reached a decision on application of the Rules."

16. This was also endorsed by the Court of Appeal in Singh and Khalid where Underhill LJ said (at para 64):

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

17. More recently the Court of Appeal in SS Congo [2015] EWCA Civ 387 stated in paragraph 33:

*"In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ. "*Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

18. The S117B considerations are as follows:

"(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."

19. In relation to the writing of decisions I remind myself of what was said in Piglowska v Piglowski [1999] 1 WLR 1360 Lord Hoffmann said at p. 1372 that *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed..... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Proceedings Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

20. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1) : "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."*

Finding on Material Error

21. Having heard those submissions, I reached the conclusion that the Tribunal made no errors of law that were material to the outcome of the decision.

22. This was an application for leave to remain predicated on a concession that the Appellant could not meet the requirements of the Immigration Rules, specifically Appendix FM and paragraph 276ADE (1) whose purpose is set out in Appendix FM as:

"it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public

interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002)"

23. While recognising that the Rules can nevertheless not cater for every nuance of applicants lives the courts have recently identified in SS Congo that the correct test to apply is that '*compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules.'*

24. When read as a whole this is exactly what the Judge has assessed in his decision.

25. The Judge set out in detail and self-directed himself appropriately on those questions he was required to ask at paragraph 12 of his decision where he sets out the 5 Razgar questions: he is not required to set them out again in his findings provided it is clear he has considered them.

26. There is no merit in the argument that the Judge focused too much on paragraph 276ADE as indeed it was conceded by counsel in the first tier that the Appellant could meet the evidential burden of establishing that she had no ties to Nigeria, the test at that time. The Judge made reference to the Appellant's ties to Nigeria in his Article 8 assessment as this was clearly part of a rounded assessment of the proportionality of her returning there.

27. It was argued there is no proper analysis of family or private life but the starting point in this case in relation to family life was that this was a relationship between parents and an adult child where there is no presumption of family life. The case was argued on the basis that there was a high level of co dependency which supported a finding that there were more than normal emotional ties and therefore family life for the purpose of Article 8. The Judge considered that argument at paragraph 22 in some detail having heard oral evidence from the Appellant and her parents. He did not find the parents convincing witnesses and made findings that were open to him that their health issues were 'simply the sad concomitants of old age.' He also noted that whatever difficulties the Appellant's mother had they did not prevent her working part time in a nursing home as a care assistant. I am satisfied that it was therefore open to him to find that their circumstances were 'seriously exaggerated'. This finding was not challenged.

28. The Judge might be criticized for accepting, given his finding in relation to the serious exaggeration of the alleged co-dependency that Article 8(1) family life was established, but given that he went on to consider proportionality he was clearly prepared to accept this even allowing for his reservations. Nevertheless, that finding would impact on the nature and quality of family life in this case that underpinned the appeal and the assessment of proportionality. He might additionally have been entitled to note that the Appellant's relationship with her parents had always apparently been enjoyed at a distance in that she had according to the witness statement before the Judge attended boarding school in Nigeria and then come to the UK without her parents in 2006 and they had not lived together as a family again until her parents came to the UK in 2009.

29. The Judge I accept made very limited findings about the Appellant's private life (paragraphs 21 and 23 refer to her career and engagement with the community) but given that he would have been statutorily obliged under s117B to give little weight to a private life established while her status was precarious this could have made no material difference to the outcome of the case. The Judge should also (but did not) consider the other statutory public interest factors set out in section 117B which not only do not assist her but include the requirement to take into account that the maintenance of immigration control is in the public interest and the Appellant does not meet the Rules that underpin that system of control.

30. Ultimately the Judge set out all of the material facts in this case but both counsel in the first tier and Mr Plowright had to concede that the only factor that could be prayed in aid of an argument of 'compelling circumstances', which it was accepted was the correct test to apply, was the health of her parents. Given his findings about that I am satisfied that the Judge was entitled to conclude that there were no compelling circumstances.

31. I remind myself of what was said in Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC) about the requirement for sufficient reasons to be given in a decision in headnote (1) : "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."*

32. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning and identified accurately the facts on which the argument of compelling circumstances was based but rejected that evidence.

CONCLUSION

33. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

34. **The appeal is dismissed.**

Signed Date 10.3.2016

Deputy Upper Tribunal Judge Birrell