Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU113272015

THE IMMIGRATION ACTS

Heard at North Shields
On 6 April 2017
Prepared on 15 May 2017

Determination Promulgated
On 22 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

O. O.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Marfat, Solicitor, Newcastle Legal Centre
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Nigeria, entered the United Kingdom lawfully on 12 September 2005 as a student. His leave to remain as such expired on 31 October 2009. An application made in time for a variation of his leave as a Post Study Work Migrant was refused on 17 November 2009, and his appeal rights in relation to that decision were exhausted on 8 March 2010.

2. On 5 July 2010 the Appellant was granted leave to remain as a student until 5 July 2012. On 13 June 2013 he was granted leave to remain as a Post Study Work Migrant until 14 October 2013. An application having been made after the expiry of that last period of leave, he was then granted leave to remain as a Tier 4 student on 9 November 2013 until 25 January 2015; although that leave was then curtailed by decision of 1 August 2014.
3. On 26 November 2014 the Appellant was granted a further period of leave to remain as a Tier 4 student until 28 June 2015. An application to vary that leave on the basis of his Article 8 rights was made pursuant to Appendix FM to the Immigration Rules on 24 June 2015, but this was withdrawn on 7 September 2015. In the meantime, on 19 August 2015, the Appellant had made an application for indefinite leave to remain based upon the length of his residence in the UK, which was refused on 5 November 2015.
4. An appeal against the refusal was allowed on Article 8 grounds in a decision of the First tier Tribunal ["FtT"] promulgated on 16 May 2016.
5. The Respondent's application to the FtT for permission to appeal that decision complained that it had been conceded at the hearing that the Appellant could not meet the requirements of the Immigration Rules, and that the Judge's approach to the Article 8 appeal was flawed. Permission to appeal was granted by decision of First tier Tribunal Judge Foudy on 30 January 2017 on the basis it was arguable the Judge failed to apply the correct test when considering Article 8, in particular to the weight attached to the circumstances the Appellant might face living in Nigeria.
6. The Appellant filed no Rule 24 notice in response to that grant of permission, until the hearing itself. That document failed however, as Mr Marfat acknowledged, to engage with the terms of the Respondent's challenge, and simply sought to re-argue the appeal.
7. Neither representative had, or had read, a copy of the decision of the Supreme Court in Agyarko and Ikuga [2017] UKSC 11, so the appeal was stood down to allow them to do so.
8. Thus the matter comes before me.

Error of law?

9. As Mr Marfat (who did not appear below) was forced to accept, it was conceded before the FtT by Counsel who then appeared, that the Appellant did not meet the requirements of the Immigration Rules for the application for indefinite leave to remain that he had made on 19 August 2015 on the basis of his "long residence". That concession was clearly correctly made in the light of the Appellant's immigration history.
10. Although the Judge appears to have proceeded on the basis that the Appellant was always under a genuine and well founded, albeit mistaken, belief that he had a flawless immigration history, there was no concession to that effect from the Respondent, and no reasons were given for such a conclusion [20]. It is not possible to discern from the Appellant's immigration history how he could have genuinely formed such a mistaken belief, when he had unsuccessfully pursued an appeal against a refusal of

leave in 2009 so that there was a significant break in the chain of grants until 5 July 2010.

11. Counsel below conceded in addition that the Appellant did not meet the requirements of any of the routes potentially open pursuant to Appendix FM of the Immigration Rules. The Judge reviewed the evidence and concluded that this concession was also correctly made in the light of the Appellant's age upon first arrival in the UK in 2005, and his age at the date of the hearing. He noted that the Appellant had visited Nigeria as recently as 2010, and that he remained in regular contact with his parents and family in Nigeria, so that he retained his social cultural and family links to Nigeria and fluency in Yaruba.

12. Although the Judge did not have the benefit of the guidance of the Supreme Court in Agyarko, and did not refer himself to the guidance to be found in the decision of the Court of Appeal in that case, he did find that there was no reliable evidence before him of any insurmountable obstacles to the Appellant's re-integration into Nigerian society [12(g)].

13. The Judge went on to note that no valid application had been made for a grant of leave to remain based upon the Appellant's relationship with a British citizen, Ms W. In any event, there was no evidence before him to suggest that the Appellant could meet at the date of the hearing the threshold financial requirement for such an application.

14. The Judge therefore dismissed the appeal under the Immigration Rules, and went on to consider the appeal outside the Immigration Rules on Article 8 grounds, although in fact it would appear that by virtue of section 82(1) of the 2002 Act, the only ground of appeal available to the Appellant was that the decision was unlawful under section 6 of the Human Rights Act 1998.

15. I am satisfied that the Judge did accept that the relationship formed between the Appellant and Ms W constituted "family life" for the purposes of Article 8 [18]. However that finding requires some unpicking, and the development of the relationship requires some analysis against the chronology of the Appellant's immigration status, which is not to be found in the Judge's decision. That is in my judgement an error of law, because such an analysis is relevant to the weight that the tribunal is able to attach to the "family life" relied upon, and in turn affects the fair balance that the Tribunal is required to strike against the clear public interest in the Appellant's removal.

16. The couple are an unmarried couple, who have as yet no children. They told the Judge they would like to marry and start a family, but they had no concrete plans to do so. On the evidence placed before the Tribunal they had met in November 2009 [11(j)]. I note that this was therefore at a time when the Appellant's position was at its most precarious, although by virtue of the operation of section 3C, I accept that it fell short of being unlawful; *Jeunesse*. The Appellant's initial grant of leave to enter as a student had expired on 31 October 2009. He had made an in time application to vary that leave, but it was refused on 17 November 2009 and his appeal rights against that decision were exhausted on 8 March 2010.

17. The couple had commenced co-habitation in July 2012. This too, occurred at a time when the Appellant's position was extremely precarious, albeit lawful. His most recent period of leave to remain as a student had expired on 5 July 2012, and although he had made an application to vary that period of leave as a Post Study Work Migrant it was not granted until 13 June 2013.
18. The Judge ought then to have turned to the issue of whether or not the Appellant was bound to be successful in a notional application for entry clearance as Ms W's partner, were such an application under consideration at the date of the hearing. If he was certain to be granted leave, then it would be open to the Tribunal to conclude in the appropriate circumstances that there might be no public interest in his removal; Agyarko [51]. This was however, on its facts, not such a case.
19. Equally, it could not be said that the Appellant and Ms W could never arrange their affairs so that a successful application might be made in the future. Ms W had an income from her self employment as a beautician of £8,000 pa. On the face of things she had a further unused earning capacity, and she also had an asset in the form of the home she owned jointly with her parents, although the evidence did not disclose the equity in that property.
20. Given that the relationship was formed and continued whilst the Appellant's situation was precarious, the Judge ought to have gone on to recognise that the European court had said in *Jeunesse* that it is likely only to be in exceptional circumstances that the removal will constitute a violation of Article 8, as recognition of the weight that must be given to the public interest in removal. This the Judge did not do, and in my judgement the decision clearly discloses a failure to give the public interest the proper weight. That being the case both parties were content that I should set aside the decision and remake it without the need for hearing either further evidence, or argument.
21. There was no delay in the enforcement of immigration controls, and thus there was nothing on the evidence in this case which could be said to give rise to a dimunition in the cogency of the public interest in the Appellant's removal.
22. If the Judge had recognised expressly that something very compelling was required to outweigh the public interest, then he would have been bound to recognise that the evidence placed before him simply did not disclose such a state of affairs. I do note the Judge's finding that the Appellant had benefited from his education in the UK, and had paid the taxes due upon his earnings in the UK, but that is hardly unusual and is certainly not enough to outweigh the public interest, even when considered in conjunction with a desire to marry and start a family with a British citizen.
23. The simple truth that lies at the heart of this appeal is that the Appellant could return to the shelter and support of his family in Nigeria in safety, and with the benefit of his education and employment experience, could be expected to have a promising career in Nigeria. He had no entitlement to demand that he be allowed to pursue his career in the UK notwithstanding his inability to meet the requirements of the Immigration Rules. His partner

faced a choice. She could either relocate to Nigeria to live with him there, or, the couple could arrange their affairs so that in the future he would be able to make a successful application under the Immigration Rules for entry clearance as a partner. In the meantime she was able to visit him in Nigeria in safety. What the couple could not do was simply demand that the Appellant be granted leave to remain, notwithstanding his inability to meet immigration controls, in reliance upon the "family life" created whilst his position in the UK was precarious, as a *fait accomplit*.

24. I dismiss the appeal.

DECISION

The decision promulgated on 16 May 2016 did involve the making of an error of law that requires it to be set aside and remade. I remake the decision so as to dismiss the appeal.

Deputy Upper Tribunal Judge JM Holmes
Dated 15 May 2017