



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24527/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 July 2018

Decision & Reasons Promulgated
On 04 September 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

PATRICIA [O]
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood, Counsel instructed by Fursdon Knapper Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria. She was born on 15 August 1946 and so is now 72 years old. She entered the United Kingdom as a visitor in February 2004. Her leave expired in November 2006. She remained in the United Kingdom as an overstayer without making any attempt to regularise her position for almost ten years. On 27 October 2016 she applied for indefinite leave to remain. The application was refused and an appeal dismissed. On 3 March 2015 she made a further application on private and family life grounds which was refused. Following judicial review the decision was reconsidered and refused again on 18 October 2016.

It is that decision that was appealed unsuccessfully to the First-tier Tribunal and which the appellant not appeals.

2. I begin by considering the First-tier Tribunal's reasons for dismissing the appeal. At paragraph 12 of the Decision and Reasons the judge said:

“The facts of this case are not in issue. The appellant has not had any right to remain in the UK since her visit visa expired in 2006. All subsequent applications have been refused. The appellant has received care on the National Health Service for a number of serious health issues. Most significantly she receives dialysis three times a week for her kidney problem. She has received treatment for her ear, and her heart. She has received treatment for her shoulder and a toe has been amputated. She receives approximately thirteen different medications.”

3. The judge then went on to find that the appellant had established a “strong private life in the UK”. She had a close relationship with her adult daughters and her grandchildren and went to church regularly. Clearly the judge found this to be good evidence of significant links with the community outside the home.
4. The judge found that the appellant's circumstances could not come within the terms of paragraph 276ADE of HC 395 because she was not suitable because she had not paid the National Health Service a bill for medical services in the order of £5,000. The judge rightly noted that this failure disqualified her from satisfying the Rules but also said that even if the appellant had not been disqualified she would not satisfy the Rules in his judgment because there would not be “very significant obstacles to her integration into Nigeria”.
5. The judge said that the appellant had lived in Nigeria for 59 years and he just did not believe that she had no friends or family there after living there for all that time. The judge also said that there was “no evidence that she is unable to fly”.
6. The judge decided that there was no protected “family life” within the meaning of Article 8(1). Her closest personal relationships were with her adult daughters and he found that there was nothing about those relationships that enable them to be “family life” for the purposes of the European Convention on Human Rights.
7. Wholly unremarkably, the judge accepted that there was a “private life” and that removal would interfere with that private life. He similarly uncontroversially determined that the interference would be of sufficient gravity to potentially engage the protection of the Article 8 but that removal was lawful and necessary. The more difficult issue was whether refusing leave was proportionate. The judge described the interference and said that having to move to Nigeria “would involve a substantial interference with her life”.
8. The judge also accepted evidence showing that dialysis treatment was available in Nigeria at a price and found that he had no reason to think that the other medical conditions which the appellant complained could of not be addressed there.

9. The judge reminded himself of Section 117B(1) of the Nationality, Immigration and Asylum Act 2002 which gives statutory authority for the proposition that maintenance of effective immigration control is in the public interest and that little weight should be given to the appellant's private life established at a time when the appellant was in the United Kingdom unlawfully or when her immigration status was precarious. This appellant's status had never been better than precarious and for most of the time was unlawful. The judge found that the appeal on human rights grounds had to be dismissed.

10. Permission to appeal was granted by a different First-tier Tribunal Judge. The judge who granted permission was concerned that there had been procedural irregularity. The point is made aptly at point 2 of the decision to give permission to appeal and I set it out below:

"The grounds assert that the judge erred in his determination which amounts to an error of law. In the proportionality balancing exercise the judge failed to consider and attach weight to the medical evidence in support of the appellant's case. That medical evidence was a two-page letter dated 1 February 2016 written by Hamish Dobbie, consultant nephrologist. The judge asked for the appellant's solicitors to e-mail a copy of that medical report directly to the Tribunal. A copy of the fax cover sheet is provided. The fax was sent to the Tribunal on 15 February 2018 at 10:38 hours, job 01152. The judge did not receive that letter by the end of the hearing. The judge gave Counsel the judge's personal e-mail address so that the medical report could be sent to the judge for consideration. It was accepted that the medical report would form part of the evidence of the appeal. The medical report was sent by e-mail on 16 February 2018. The absence had mentioned in the medical report in the decision amounts to a material error of law as it was unfair and prejudiced the appellant's case. Those representing the appellant made every effort to provide the medical report to the judge by fax and e-mail. The judge's failure to consider the medical evidence amounts to a material error of law."

11. I will summarise that evidence now. The first page consisted of a summary of conditions and treatments that the appellant had demonstrated over many years. I see no need to disclose these personal matters. Suffice it to say that the appellant has needed treatment for significant conditions on many occasions.

12. I set out the text of Dr Dobbie's letter after the list of treatments and medications. Dr Dobbie said:

"I write concerning this lady's status in the UK. She is a very long-standing patient and of the Royal London Hospital Renal Unit. She has now been on dialysis since 2006 and we have been looking after her all of this time. She has been under my personal care on the Whipps Cross Renal Unit for the last four years.

Mrs [O] came to the UK first in 1965. Two of her children were born here in 1967 and 1970. Over the last 50 years she has spent the majority of her time in the UK

I understand that she is now trying to regularise her paperwork. We have taken full responsibility for her renal care for the whole of the last ten years. She is absolutely dependent on dialysis treatment. She also had a bypass operation at St Bartholomew's Hospital in 2011.

Mrs [O]'s health is not as good as it used to be. She walks with a stick and slowly. She is absolutely dependent on three times a week life preserving dialysis treatment which will need to continue for the rest of her life. She has the long list of medical problems outlined above and also takes a substantial list of tablets as above.

I would be delighted to answer further questions about her history if this would be helpful. At present I would regard as risky for her to travel and I have advised her against doing this."

13. At the start of the hearing Mr Haywood asked to amend the grounds. I gave permission. By permitting the application I was able to crystalize points that Mr Haywood would probably have been able to make without the amendment and it does not seem to me that an appeal concerning the welfare of a 72 years old woman is an appropriate place for taking an overly prescriptive view of the role of the Rules. Perhaps more importantly, I saw nothing in the amendments which would have disadvantaged unfairly the Secretary of State.
14. There are three additional grounds. The first is that the First-tier Tribunal Judge is said to have erred by asking himself if there was medical treatment available in Nigeria rather than if there was treatment that the appellant could obtain. A second additional ground is that the judge did not make any findings on the evidence of the appellant and her three daughters and particularly on their claim that the appellant would have to live on her own in the event of return to Nigeria as she no longer had friends or home there and the third additional ground is that the judge erred in not accepting that the degree of dependency established in the relationship between the appellant and her adult daughters was evidence of sufficient dependency as to amount to family life for the purposes of the "private and family life" considerations of Article 8 of the European Convention on Human Rights.
15. The judge set out an outline note of the evidence that was called before him. He said at paragraph 13:

"I do not consider that the appellant would be able to establish that there would be very significant obstacles to her integration into Nigeria, since she has lived there for 59 years, and although she claims that she has no friends or family in Nigeria, I do not accept that this is likely having regard to the fact that she has lived there for nearly all her life."
16. In making this finding the judge clearly disbelieved contrary evidence from the appellant and her daughters.
17. It was also the appellant's case that she had lived in the United Kingdom since 2006 and consequentially had lost ties with Nigeria. Whilst it might be surprising if there

is no one at all in the entire country of Nigeria, which is a very populous, who would be genuinely pleased to see the appellant in the event of her return and to pass the time of the day with her after a gap of ten years I am not persuaded that it is sufficient reason to disbelieve the evidence that there are no family members or close friends who would support her. Simply to say that there must be such support because the appellant has lived in Nigeria for 59 years will not do. I am not satisfied that the judge was not entitled to conclude for the reasons given that there must be a home or family to support the appellant in Nigeria.

18. The judge's decision that there was no "family life", if wrong, is wrong in law rather than fact. The distinction between "family life" and "private life" is not one to be found in the terms of the Convention which refers to "private and family life" as an entity but although it is sometimes convenient to think in terms of either "family" or "private" life it is not always a particularly happy way of analysing Convention obligations. It matters in a case such as this because section 117B(4)(a) requires that little weight is given to "private life" or a relationship formed with a qualifying partner at a time when the person was in the United Kingdom without permission. It does not indicate what weight should be given to "family life" established with a person who is neither a qualifying partner nor a qualifying child.
19. In this case the evidence clearly points in favour of there being a degree of emotional and physical dependency by the appellant on her daughters. That such dependency exists is inherently likely given the appellant's age and health. She has no other known close relatives. Her daughters show every indication of feeling a sense of responsibility towards their mother which they discharge, no doubt lovingly, but there is quite a high degree of dependency.
20. I remind myself of the well known test in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 where Sedley LJ approved the explanation in S v United Kingdom (1984) 40 DR 196 that a relationship between adults, in that case a mother and her son, "would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties".
21. Although the First-tier Tribunal was clear to refer to the appellant and her daughters having a "strong" private life I cannot see how the judge can lawfully conclude that the relationship should not be characterised as "family life". The evidence appears to have been accepted by the First-tier Tribunal Judge, and there seems no reason whatsoever not to accept it, that the appellant habitually lives in the same household as her daughter [E], that [E] and her sister [V] share caring for the appellant and, typically, the appellant's other daughter [A] sees the appellant twice a week. She also has meaningful relationships with her grandchildren.
22. Further, the appellant is a sick woman with multiple medical conditions including but not limited to the need for kidney dialysis three times a week. The appellant also uses a walking frame since fracturing her leg. The necessary care and support is not simply a matter of providing companionship but there is the element of nursing and

managing associated with the three times a week dialysis treatment and other episodes of extreme care necessitated by surgery and other medical problems. The evidence was that the appellants daughters prepare her meals, wash her and help her use the toilet. Sometimes they help her dress.

23. This goes beyond the normal ties of affection and, I find, the First-tier Tribunal Judge should have accepted it as evidence of family life.
24. I also agree with Mr Haywood that the judge's consideration of the availability of dialysis care was wrongly limited to its presence in Nigeria rather than whether it could be accessed by the appellant. The judge's approach may well have answered an argument that removing the applicant would create a real risk of exposing her to treatment forbidden by article 3 of the European Convention on Human Rights but Mr Haywood was careful to put the case on the footing that there are insurmountable obstacles in the way of establishing herself in Nigeria and the judge was not directing his mind correctly to the right questions to investigate that point.
25. It follows that I find the First-tier Tribunal erred in law and I set aside its decision.
26. This does not mean that the judge has reached the wrong conclusion but that the reasons for getting there are not lawful.
27. This is a case that can be remade on the evidence that is before me. The appellant must prove her case and, insofar as a standard of proof is relevant to a balancing exercise, the "real risk" standard applies.
28. I accept that there is a sufficiently close dependent relationship between the appellant and her daughters in the United Kingdom for there to be family life. I consider the Rules because these are a guide to policy and I consider them as they are when I remake the decision, that is now, not as they might have been at an earlier stage in the application process.
29. There is evidence before me that the outstanding bills which disqualified the appellant from the scope of paragraph 276ADE had been met. This is not to say that future bills are being paid. How future bills will be met is a gap in the evidence that concerns me but the evidence is that the outstanding bills are now paid and the appellant would therefore appear to be suitable.
30. However she must still show that there are insurmountable obstacles in the way of establishing herself in Nigeria.
31. Put simply, she has not done that.
32. I have considered the medical evidence. I appreciate the general evidence about the difficulty in obtaining dialysis care in Nigeria. I do fully appreciate the desirability of dialysis being provided as required which typically means regularly about three times a week and that getting such a service requires considerable financial and

social commitment. I accept that the appellant would find it difficult to arrange or attend dialysis sessions on her own.

33. However I do not have any evidence of contact with the providing hospitals in Nigeria to see what would have to be done for the appellant to take advantage of the care. For example the appellant has not, by herself or her representatives and family, worked out which hospital she might be able to live near and what care can be provided and what it would cost and how she could finance it or why she could not do any of these things. She has not shown any consideration of returning to Nigeria as a patient of a care home or some similar body or possibly even with the paid carer. I fully appreciate that this is not what the appellant wants to do and is not what her daughters wish to do but the appellant does not establish a right simply by not considering something she finds unattractive. There is no evidence before me which enables me to say with any degree of confidence that the appellant could not find suitable care in Nigeria and could not get hospital treatment. It may be that she cannot but the point has not been addressed. It is not sufficient to refer to general reports explaining how it is usually problematic. It is clearly the case that some people can obtain dialysis care in Nigeria and it is for the appellant to show why she cannot be one of them. She has failed to do that. I suspect it is because she has failed to apply her mind to it but that is symptomatic of someone who does not want to go back and clings to every opportunity to create difficulties. It will not do.
34. Similar points can be made about the day-to-day care. It may well be that the daughters have no wish to leave their homes in the United Kingdom but appellant's daughters are not the only possible avenue for care. Without clear evidence about why day-to-day care cannot be bought in Nigeria I cannot say that it cannot be done.
35. I understand completely that the appellant would prefer to be in the care of her daughters who would prefer to be the providers. That is what love and affection in families mean and, coupled with the care that is being provided, is one of the reasons I am prepared to say that this is a case of "family life" but I cannot say that removal would be a disproportionate interference in that family life when there is no evidence before me to explain how such an alternative could not be arranged or at what cost it could be arranged. Appellants who face the prospect of leaving the United Kingdom to set up in a country where they have weak links need to understand that the burden on them requires them to show why the more congenial care that they want to have in the United Kingdom is the only care that is available to them.
36. I have to consider carefully what is proportionate here. The appellant is in the position that she is because she has chosen to live in the United Kingdom without permission for many years. The effluxion of time does not make it more acceptable that she remains. It merely shows her continuing disregard for immigration control.
37. Further she has accrued significant health service bills which were not paid until shortly before the hearing before me. She continues to need dialysis and has not shown what that will cost, still less how she can expect to pay the charges. There is

every reason to think that her remaining in the United Kingdom will be a burden on the tax payer.

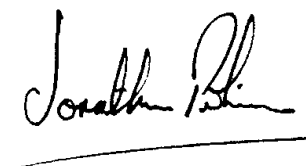
38. The maintenance of immigration control is in the public interest. It is unattractive to conclude that a person who has remained in the United Kingdom in defiance of immigration control has acquired a right to be is unattractive, and the more so when, as is the case here, the difficulties consequent on return have increased by reason of the appellant's prolonged absence from Nigeria and presence in the United Kingdom. She could have returned when she was fit enough to look after herself.
39. Although I am not required by statute to give little weight to the family life that the appellant has established in the United Kingdom I find that her desire to continue to enjoy it, and the rights of her adult children who are settled in the United Kingdom to continue to care for her there are less weighty than the need to maintain immigration control.
40. I have in mind her claimed difficulties in re-establishing herself in Nigeria. Given that I accept that she has no obvious means of emotional support in that country and given that it clearly can be difficult to obtain dialysis these difficulties may well be real but there not established. Even if they were I may not have been persuaded that they were "unjustifiably harsh consequences" for the appellant as she has shown a cynical disregard for the rules but the difficulties have been suggested rather than made out.
41. Similarly she has not established "very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK". For the avoidance of doubt, I accept that not being able to access medical treatment necessary for life *might* be such an obstacle but the appellant has merely shown that such treatment is often hard to obtain. That is not enough.
42. The rules relating to entry clearance for dependant adult relatives are not applicable as the appellant wants leave to remain but they might illuminate the decision-making process. If they were relevant the appellant would fail to satisfy them because she has not shown that the care needs could not be met in Nigeria.
43. In short, she has not shown that she could meet the rules.
44. Part 5A of the Nationality, Immigration and Asylum Act 2002 does not assist me. This is not a deportation appeal. Clearly there is a public interest in maintaining effective immigration control but this Section does not tell me much about the "family life" end of the "private and family life continuing". Part 5A is not exhaustive or exclusive.
45. I accept the appellant can speak English. I accept she has some involvement outside the home in the church that she chooses to attend. I acknowledge too that in her younger days she lived lawfully in the United Kingdom. I accept that she has some "feel" for life in the United Kingdom and has the potential to be integrated albeit that she is now frustrated by failing health.

46. However I find the need to enforce immigration control particularly high in a case where the dependency in her private and family life has been established over many years by showing complete disregard for the requirements of immigration control. In the absence of any evidence that proper arrangements could not be made for her in Nigeria I find the decision to remove is proportionate.
47. It follows therefore that although I find the First-tier Tribunal erred in law and I set aside its decision I substitute with the decision dismissing the appellant's appeal against the decision of the Secretary of State.
48. It follows that although I allow the appeal to the extent that I find that the First-tier Tribunal erred in law and I set aside its decision, for the reason given above, I dismiss this appeal.

Notice of Decision

Appeal dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 24 August 2018