Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/16759/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 September 2018	**On 2 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

EUNICE OSUNDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, of Counsel
For the Respondent: Ms J Isherwood Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant is a national of Nigeria born on 24 July 1972. On 29 February 2016 she applied for settlement outside of the Immigration Rules ("the Rules"). The application was refused inter alia under paragraph 322(5) of the Rules on the basis that her presence in the UK was not conducive to the public good and further refused under Appendix FM, paragraph

276ADE and, outside of the Rules, on the basis that there were no exceptional circumstances.

2. The appellant appealed the decision. First-tier Tribunal Judge Anstis dismissed the appeal. Following an error of law hearing I set aside the decision of the First-tier Tribunal because there was a failure to take into account relevant factors in the assessment of proportionality under Article 8 of the European Convention.

3. The appeal was listed for a resumed hearing in order to remake the decision. As the facts were not in dispute; the findings of the First-tier Tribunal being preserved, it was not necessary to hear oral evidence and the hearing proceeded by way of submissions.

4. The factual background is as follows. The appellant is a 46-year-old woman who has lived in the UK for twelve (nearly thirteen years). She spent approximately the first 31 years of her life living in Nigeria before she moved to Italy where she spent three years living with her husband as a work permit holder before she came to the UK. In 2004 the appellant applied from Italy to enter the UK as a student. She entered the UK on 12 September 2005 with entry clearance as a Tier 4 (Student) Migrant. She was subsequently joined in the UK by her husband on 31 December 2008. While Ms Fisher in her skeleton argument refers to Mr Osunde's leave in Italy expiring on 30 October 2014, his evidence to the First-tier Tribunal, supported by his Italian identity card, was that he had leave to remain in Italy until November 2014.

5. The appellant's leave as a student expired on 30 August 2014, and she made an in-time application for leave to remain again as a student, but this was refused on 3 November 2014. Central to that refusal was an allegation that the appellant had attempted to obtain leave to remain by deception by a making a false representation. The particulars of that allegation were that she had been dishonest in denying she had not previously been refused entry clearance to the UK when in fact she had. The decision refusing the application stated that she did not have a right of appeal and this is confirmed by the respondent in his refusal of 27 June 2016, but on 20 November 2014 a removal decision under section 10 of the Immigration and Asylum Act 1999 was served on the appellant and Ms Isherwood was able to show that this informed the appellant of her right to an out of country right of appeal.

6. On 29 February 2016 the appellant applied for indefinite leave to remain outside of the Rules. The basis of her claim was that she and her husband had no family, home or job to return to in Nigeria whereas in the UK she was supported by her brother-in-law, cousins, nephews, friends and the church community and her husband's brother and his family. She also expressed concerns over being ostracised by Nigerian society as she was childless, and her husband made reference to his loss of rights in Italy by his inability to renew his leave to remain in 2014 as the Home Office held his passport.

7. Central to the refusal was a repeat of the earlier deception allegation and an application of paragraph 322(5) of the Rules. In relation to that allegation, the appellant claimed that she misunderstood the question in the application form. She made a genuine error and would not have enclosed her passport with the application endorsed with the previous refusal if she was dishonest.

8. The First-tier Tribunal heard from the appellant and found that she was not guilty of deception and found that the refusal invoking general grounds of refusal was wrong. The Fist-tier Tribunal did not accept however that the appellant met the requirements of paragraph 276ADE(1)(vi) of the Rules as it had not been shown that there were "very significant obstacles" to her integration in Nigeria. As for its consideration outside of the Rules the First-tier Tribunal answered questions (1) – (4) of Razgar in the affirmative, noting that while there was no interference with family life, the relationships enjoyed by the appellant with other family members and friends in the UK fell to be considered as aspects of her private life.

9. The issue in the appeal that requires remaking is the question of proportionality. A summary of the parties' submissions on the issue is as follows.

Submissions

10. Ms Isherwood began by reminding the Tribunal that the appellant's immigration status was precarious throughout and should be given limited weight pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The appellant had completed her course and the purpose of her entry had been fulfilled. There was no evidence that the respondent's refusal prevented the appellant's husband from renewing his leave in Italy or of any requests being made to return his passport. There was no delay by the Secretary of State in consideration of the application in 2014, but it was the appellant who delayed until 2016 before submitting an application outside of the Rules. The appellant was given an out of country right of appeal which she failed to exercise. Ms Isherwood acknowledged the appellant was penalised by being wrongly accused of deception, but it was not certain that she would have been granted leave to remain. The appellant together with her husband could continue to enjoy family life in Nigeria and they could find work. Ms Isherwood submitted that there was no evidence of exceptional circumstances and she urged me to dismiss the appeal.

11. Ms Fisher filed a skeleton argument which she augmented at the hearing. Ms Fisher submitted that the out of country right of appeal did not advance the Secretary of State's case. The First-tier Tribunal's finding that there had been no deception was relevant to proportionality. The appellant had not completed her course. The appellant had a basis to renew her leave. The appellant and husband had permanent residence in Italy and were exercising treaty rights. They had no reason to request their passport as they had no reason to believe that the application would

be refused. Ms Fisher submitted that but for the deception the appellant met the requirements of the Rules. She referred to the appellant's lawful residence over nine years and the unlawful allegation of deception. Even with precarious status the appellant and her husband were working towards settled status and maintained and accommodated themselves.

Conclusions

12. I have remade the decision on the basis of the findings of the First-tier Tribunal, the evidence before him, and the submissions that I heard from the representatives. I am allowing this appeal on the basis identified below for the following reasons.

13. First, this is a case where the appellant came to the UK lawfully for the purpose of study. She remained here lawfully in that capacity until August 2014 hoping to complete an MBA. Whilst engaged in studies she was supported by her husband and family. There has been no recourse to public funds and the appellant, and her husband have remained as defined by the Rules financially independent.

14. Second, it is established that the appellant has a significant private life with family and friends in the UK. Her studies have also been a significant part of her private life. The refusal of her 2014 student application prevented her from completing her studies. The certificate produced by the appellant is an interim award of Higher Education. She has not completed her MBA. The First-tier Tribunal noted the failure of the Secretary of State to provide prima facia evidence of dishonesty and accepted the appellant made an innocent mistake.

15. Third, notwithstanding the fact that it has now been demonstrated that the appellant was given the right to exercise a right of appeal out of country, I agree with Ms Fisher that this does not advance or indeed justify the Secretary of State's refusal in 2014. There was no dishonesty. The appellant had been here as a student over a lengthy period before this application in 2014 and applied to continue her studies and was maintained and accommodated. There is no apparent reason, and none has been identified, why save for the allegation of deception, that application would not have otherwise been successful.

16. Fourth, the wrongful break in the appellant's student leave has prevented her from completing her studies. There has been a "historic injustice" to the appellant if full regard is had to her history that has clearly impacted upon her. When the Article 8(2) balancing exercise is performed, it is clear from established jurisprudence that the "historic injustice" falls to be taken into account. It is not irrelevant.

17. As was made clear by the Court of Appeal in **Gurung** (at paragraphs 36 to 37), the "requirement to take the injustice into account in striking a fair balance between Article 8.1 rights and the public interest in maintaining a firm immigration policy is inherent in Article 8(2) itself …"

18. Fifth, a fair approach consistent with an acknowledged right to respect for her private life, means that a period of discretionary leave should be granted to her, permitting her to live, and work, and study for a suitable time to enable her to complete her studies.

19. Sixth, the balance of other considerations relevant to the proportionality exercise falling in favour of the appellant are her length of residence in the UK for 12 years, she migrated to the UK lawfully and has an established private and home life in the UK with family and friends.

20. The factors that militate against the appellant are as follows.

21. First, the Appellant's case is not one where she is seeking to rely upon Article 8 as a general dispensing power because she does meet the requirements of the Rules.

22. Second, regard must be had to the public interest considerations set out in section 117B of the 2002 Act. It is in the public interest to maintain an effective system of immigration control [s.117B(1)]. The appellant speaks English and is financially independent [s.117B(2)]. These are neutral factors and do not lend additional weight to the public interest: see **AM (S.117B) Malawi [2015] UKUT 260.**

23. Third, little weight is to be given to the appellant's private life which has been established in the UK at a time when her immigration status was precarious [s.117B(4)].

24. Fourth, it has not been shown that the 2014 refusal prevented and thereby prejudiced the appellant's husband. The application was refused early in the month on 3 November 2014. On the evidence he gave to the First-tier Tribunal his leave expired in November 2014. There is insufficient evidence that his leave had expired by the date of refusal. If it expired after that date, there is insufficient evidence that he made a request to have his passport returned or made any effort to obtain a new one or, explain why his Italian identity card could not have been used to make an application.

25. In conclusion, whilst I acknowledge and take account of the limited utility of Article 8 in private life cases and the significant weight to be attached to the public interest, I note that in **Rhuppiah [2018] UKSC 58**, the Supreme Court recently affirmed that, whilst it is the case that Section 117B makes it clear that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious", nevertheless,

> "The provisions of Section 117B cannot put decision-makers in a straight-jacket which constrains them to determine claims under Article 8 inconsistently with the Article itself. Inbuilt into the concept of 'little weight' itself is a small degree of flexibility."

26. In fact, “Section 117A(2)(a) necessarily enables their applications occasionally to succeed” (paragraph 49).

27. Bearing all of the above in mind, I reach the conclusion that I should allow the appeal. I emphasise that this is a finding on specific facts, that it is in my view a marginal decision, and that I do not in any sense consider that this would be a precedent for other cases of this kind. I have essentially come to this conclusion because when viewed in the context of the facts which go into a proportionality balancing exercise I consider that the facts of this case, in combination, are towards the – “exceptional” or “compelling” end of the spectrum.

28. I find that in this case the appellant is able to demonstrate that the Secretary of State’s refusal to exercise discretion outside of the Rules is not a necessary and proportionate exercise of power because of her established private life right. This, together with the reasons set out above as to why she was not able to continue with her studies by the refusal of her application in 2014, means this appeal must be allowed to enable her to do so. While she may only require a short period of leave to complete her course, the duration of leave is a matter for the Secretary of State.

29. For the reasons given above, I find that removal in consequence of the decision would amount to a disproportionate interference with the appellant’s right to private life under Article 8 of the ECHR.

Notice of Decision

The appellant’s appeal is allowed

No anonymity direction is made.

Signed Date: 13th January 2019

Deputy Upper Tribunal Judge Bagral

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of the amount that has been paid or is payable.

Signed Date: 13th January 2019

Deputy Upper Tribunal Judge Bagral