Tribunals Service
Asylum and Immigration Tribunal

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32266/2013

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 11th March 2014	**On 07th April 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLUWABUNMI MOTUNRAYO SHEKONI

Respondent

For the Appellant: Mr Bramble, Senior Presenting Officer
For the Respondent: Ms Smith, Counsel instructed by Wesley Gryk Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Nigeria date of birth 16th March 1987. On the 14th January 2014 the First-tier Tribunal (Judge Buckwell) allowed her appeal against a refusal to grant her limited leave to remain and to remove her from the United Kingdom pursuant to s47 of the Immigration, Asylum and Nationality Act 2006. On the 31st January 2014 Judge Macdonald of the First-tier Tribunal granted the Secretary of State permission to appeal against that decision.

2. The Respondent has been in the United Kingdom since 2004 and throughout that time has had valid leave. She first entered as a student, leave that was thereafter varied to that of Tier 4 (General) Student Migrant and then to Tier 1 (Post-Study Work). She studied architecture with a view to obtaining a full qualification from the Royal Institute of British Architects (RIBA). That is a three-part qualification. The Respondent completed her (privately funded) BSc, MSc and then the necessary work experience so that by June 2011 she had completed parts 1 and 2. In order to pass part 3 she had to complete a certain amount of work experience, which she had hoped to undertake during her period of Tier 1 (Post Study Work) leave. Unfortunately this was not possible. Her leave was to expire on the 17th June 2013 and she still had a year of experience to gain before she could pass part 3 RIBA. This was the background to the application made on the 13th June 2013 for the Respondent to be granted a further period of limited discretionary leave to enable her to complete her studies in the UK.

3. The Secretary of State refused the application with reference to paragraph 276ADE of the Immigration Rules. Under the present scheme that is the only provision covering 'private life' within the Rules. The Respondent could not meet any of the alternative requirements as to length of residence in order to succeed under that rule.

4. On appeal to the First-tier Tribunal the Respondent accepted that she could not meet the requirements of paragraph 276ADE but pursued the appeal on Article 8 grounds.

5. Judge Buckwell was clearly impressed by the Respondent whom he found to be of good character, hardworking and gifted. He noted at the outset of his deliberations that she could not meet the requirements of the Rules, and following the Court of Appeal decision in MF (Nigeria)[1] properly directed himself to the 'two-stage test', in order to conduct a Razgar[2] enquiry into whether Article 8 was engaged, and if it was, whether the decision was disproportionate. The determination states that the Judge had before him CDS (Brazil)[3] and the Supreme Court judgement in Patel[4].

6. It was found that the Respondent had no family life in the UK but that Article 8 was engaged by virtue of her well-established private life. In conducting the proportionality balancing exercise the Judge took account of the Respondent's success and investment in her studies; her credible evidence that it was her intention to return to Nigeria in order to seek work once she had completed her part 3 RIBA; specific evidence from the Architectural Association School concerning the

[1] SSHD v MF (Nigeria) [2013] EWCA Civ 1192

[2] Razgar [2004] UKHL 27

[3] CDS (Brazil) [2010] UKUT 305 (IAC)

[4] Patel and Others [2013] UKSC 72

difficulties students face in completing the required amount of work experience in a constrained time frame, and to the fact that the Immigration Rules appear to make no provision for these difficulties. Against that the Judge "appreciated and respected" the "appropriate and due weight" that must be given to the Secretary of State in maintaining an effective system of immigration control. However having weighed these factors in the balance the Judge concluded that the Secretary of State could not show the Respondent to be a burden on the UK: "indeed, the very reverse is likely". Having taken account of all of the evidence overall, he concluded that on the "particular facts" the decision was disproportionate and that the Respondent should have been granted a limited period of discretionary leave to remain.

7. The grounds of appeal are that the First-tier Tribunal erred in failing to give any or adequate reasons as to why the Respondent's private life rights would be breached if she had to return to Nigeria; particular reliance is placed on the Supreme Court decision in Patel to the effect that there is not, in Article 8, an inherent 'right to education', nor less a 'right to finish one's education'. A second ground of appeal complains that the Judge applied a 'near miss' principle in dealing with a failed PBS appeal: as Mr Bramble rightly concedes, this determination is not concerned with a PBS appeal and contains no reasoning that could be described as a 'near miss' argument.

My Findings

8. Mr Bramble's central point was that the Judge has allowed this appeal solely on the ground that this young lady should be given more time to finish her education. He placed particular reliance upon paragraph 57 of Patel:

> "The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8".

9. That point is uncontentious, with Ms Smith accepting that there is no such right protected by Article 8. Were this the only factor taken into account by the Judge this decision would need to be set aside. I do not however find this to be the case. The Judge has set out a number of reasons why he feels sympathetic towards the Respondent: had this decision been written a little later no doubt these reasons would have been framed in terms of why the consequences of decision would have been "unjustifiably harsh" for her. It was not simply that she needed more time to finish her studies: it was because the consequences of the decision would be particularly serious for her, taking into account all of the circumstances. The Judge has also considered the appropriate weight that is to be attached to the importance of immigration control and to the Secretary of State's view as to how that might best be administered. Importantly he has

also referred, in his reasoning, to the "particular difficulties for architectural students" arising under the Rules. Those difficulties arise from the prohibition in paragraph 245ZX on students spending more than five years studying at degree level or above. Although subsection (iii) of that rule provides for an exception for architecture students (it taking no less than seven years to complete a course) it was apparently agreed in this case that the exception only applies to students who have completed all three parts of the RIBA exam with the Architectural Association School. Since the Appellant undertook parts 1 and 2 with the Robert Gordon University (before the rule was introduced) she could not avail herself of it. Nor could she find a school or employer willing to act as a sponsor under the Points Bases System. Hence her unusual, exceptional, application made outside of the Rules to be given a limited period of discretionary leave to remain. This was a reasons-based challenge: I find that the determination is adequately reasoned and it is upheld.

10. A second point arose in the course of submissions. The application had expressly been made outside of the rules and based on the unusual circumstances facing architecture students caught in the 'catch 22' outlined above. This had not at any point been considered by the Respondent who had simply issued a refusal based on paragraph 276ADE of the Rules. In light of this Mr Bramble suggested that a better course for the First-tier Tribunal may have been to have allowed the appeal on the basis that the decision was not in accordance with the law, thus leaving the discretion to grant a period of limited leave to remain in the hands of the Secretary of State. I did not understand Mr Bramble to be seeking to amend the grounds of appeal, nor does it appear that either party made this argument to the First-tier Tribunal. I note here for the sake of completeness that the refusal letter bore no relation to the application made in this case and in those circumstances an alternative basis for this appeal to be allowed was as Mr Bramble puts it.

Decisions

11. The decision of the First-tier Tribunal did not contain an error of law and the decision is upheld.

12. The Respondent asked for an anonymity order. I have had regard to the Presidential Guidance Note No 1 of 2013 and to Rule 14 of the Upper Tribunal Procedure Rules 2008 which confer upon me the power to make an order for the anonymity of the parties if I consider it appropriate. I must do so in cases where serious harm could be caused to a party by the disclosure of information or a document, or where children are involved. I have a general discretion to do so in other cases where it is necessary to protect an individual's human rights. However the starting point is open justice. There is no satisfactory evidential basis for concluding that the Respondent's

human rights would be adversely affected by her being named as a party to these proceedings.

Deputy Upper Tribunal Judge Bruce
11th March 2014