Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24030/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2015	**On 6 February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CHIDI NWAGBARA NWAGBARA

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr W M Rees, Counsel instructed by Stanley Richards Solicitors, Bletchley

DECISION AND REASONS

1. Mr Nwagbara is a citizen of Nigeria whose date of birth is recorded as 22 January 1979. On 5 March 2014 Mr Nwagbara made application for further discretionary leave to remain in the United Kingdom. On 22 May 2014 a decision was made to refuse the application having regard both to paragraph 276ADE and Article 8 of the European Convention on Human Rights (ECHR). Mr Nwagbara appealed and on 15 October 2014 his appeal was heard by Judge of the First-tier Tribunal Borsada, sitting at Sheldon Court, Birmingham.

2. Judge Borsada had regard to Mr Nwagbara's immigration history noting that he had first arrived in the United Kingdom on 21 September 2007 with leave to remain as a student, and that he had always lawfully resided in the United Kingdom, with the final period of leave expiring on 1 April 2014, Mr Nwagbara having made application for further leave in time. Judge Borsada found the Appellant to be an honest and credible witness, self sufficient without recourse to public funds, and working full time with a subsidiary of a large supermarket chain. Additionally Mr Nwagbara had formed a new relationship with a British citizen and had, Judge Borsada accepted no real ties to Nigerian socially or culturally, in addition to having fallen out with his family, they not having approved of a relationship he had formed prior to marriage.

3. Judge Borsada then had regard to paragraph 353B of the Immigration Rules and after finding that the circumstances in which the application for further leave to remain was being made on similar facts, though not exactly the same, as the basis upon which a previous grant was made, found in favour of Mr Nwagbara having regard to paragraph 276ADE of the rules and in the alternative on Article 8 general grounds. The appeal was allowed and whilst the Judge Borsada did not state precisely the basis upon which the appeal was allowed the Statement of Reasons does read as if it were pursuant to both paragraph 276ADE and on human rights grounds.

4. Not content with the decision, by Notice dated 29 October 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal. The grounds point to the extent to which the judge appeared to have allowed the appeal of Mr Nwagbara in the First-tier Tribunal on the basis of the Secretary of State not having followed her own policy and further, having erred in allowing the appeal by reference to paragraph 353B. The grounds submit that the judge's assessment of paragraph 276ADE was fundamentally flawed and likewise the judge erred in her approach to Article 8.

5. On 17 December 2014 Judge of the First-tier Tribunal Lever granted permission. It does appear however that in granting permission Judge Lever had some reservations because he says at paragraph 4 of the grant:-

> *"It was also arguably an error for the judge to have found [Mr Nwagbara] met the requirements of paragraph 276ADE which appears to be the conclusion at [10] although an assessment under Article 8 ECHR appears to have been conducted before the judge had reached such conclusion under the rules."*

6. The material requirements of paragraph 276ADE are set out in the reasons for refusal letter and are:

> *"iii) has lived continuously in the UK for at least twenty years (discounting any period of imprisonment); or*

iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

vi) subject to sub paragraph (2) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the United Kingdom."

Clearly on the facts of the instant appeal the sub paragraph material to any successful outcome was (vi).

7. Mr Rees on behalf of Mr Nwagbara submitted a skeleton argument making reference to the guidance of the Upper Tribunal in the case of ***Ogundimu (Article 8 – New Rules) Nigeria [2013] UKUT60 (IAC)*** in which the fourth point in the headnote reads:-

"The natural and ordinary meaning of the word "ties" in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has "no ties" to such a country must involve a rounded assessment of all the relevant circumstances and is not to be limited to "social, cultural and family" circumstances."

8. More recently the Upper Tribunal has given guidance in the case of ***Bossadi (Paragraph 276ADE; Suitability; Ties) [2015] UK UT00042*** in which it was said as follows:

"1) *Being able to meet the requirements of paragraph 276ADE of the Immigration Rules requires being able to meet the suitability requirements set out in paragraph 276ADE(1). It is because this sub-paragraph contains suitability requirements that it is not possible for foreign criminals relying on private life grounds to circumvent the provisions of the rules dealing with deportation of foreign criminals.*

2) The requirement set out in paragraph 276ADE(vi) (enforced from 9 July 2012 to 27 July 2014) to show that a person, "is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or

> *family) with the country to which he would have to go if required to leave the UK," requires a rounded assessment as to whether a persons familial ties could result in support to him in the event of his return; an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of a claimant to achieve."*

9. Quite why Judge Borsada made reference to paragraph 353B of the Immigration Rules is not at all clear. The Secretary of State was right to point to the guidance in the case of ***Khanum and others (Paragraph 353B) [2013] UK UT00311***. Paragraph 353B in reality is not a rule that has anything to do with the Tribunal but simply sets out the policy by which the Secretary of State will consider whether or not to reverse a decision when all other avenues open to an applicant have closed. However this is a matter in her discretion to be applied when an appellant has become "appeal rights exhausted".

10. However Ms Everett accepted that the factors in paragraph 353B were factors capable of being "put in the balance" in any Article 8 proportionality assessment. The factors set out in Paragraph 353B are not of themselves objectionable. The paragraph makes reference to character, conduct and associations including criminal record and the nature of any offence, compliance with any conditions attached to a previous grant of leave and, length of time spent in the United Kingdom. Ms Everett agreed that there were factors there capable of being put in the balance. She was right, to make that concession. At the same time I agree that had the judge simply allowed the appeal on the basis that the requirements of paragraph 353B had been met, he would have erred in law for the reasons set out in the case of ***Khanum*** to which I have already referred.

11. Further, if the judge had determined this appeal on the basis that it appeared that the Secretary of State had been inconsistent in her approach to her own policy in that discretionary leave had been granted on a previous occasion, in circumstances which, though not exactly the same, were similar in all key respects, it may well be too that the judge would have erred. However I do not need to resolve that issue. This is a determination which when read as a whole can be seen to have been drafted in with various alternatives in the mind of the judge. It is possible to pick out the positive findings made by the judge, being findings that were open to him.

12. At paragraph 7 of his Statement of Reasons he said:-

> *"I did accept that any return to Nigeria would cause a huge disruption to his existing, private and family life and I did also accept that he had effectively broken his family ties because of his relationship choices [*my emphasis*] in the United Kingdom."*

13. That the judge said "choices" rather than "choice" demonstrates on the facts of this case that he was cognoscent not only of the relationship formed in the United Kingdom but also in Nigeria. I observe also that Judge Borsada was clearly very impressed by the candid manner in which Mr Nwagbara gave his evidence. The finding of animosity directed towards the Mr Nwagbara in his home country was open to the judge and one which he was entitled, to put in the mix".

14. The Secretary of State submits that the paragraph 276ADE assessment was flawed. It is submitted that it was not established that Mr Nwagbara had lost all ties to Nigeria. It was submitted that there was no corroboration of Mr Nwagbara's assertion that there was animosity between him and his family and it was submitted in the grounds that as Mr Nwagbara was brought up in Nigeria and able to speak the official language, English, he would be able to reintegrate albeit with an initial degree of hardship.

15. However an assessment of the evidence requires an holistic approach, which is what the judge did. Still further whilst the grounds point to the absence of corroboration, there is no requirement it. The judge found Mr Nwagbara an honest and truthful witness and indeed went so far as to explain why he did so.

16. Ms Everett rightly accepted that whether Mr Nwagbara had "broken all ties" was a factor to be considered in the Article 8 assessment even if not determinative in the wider consideration of it. Further, given the finding of the judge that any return to Nigeria would cause a huge disruption to existing private and family life whether one looked to the guidance in ***Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)*** or ***MM (Lebanon)*** *[2014] EWCA Civ 985* there was sufficient basis for this judge to look to the wider application of Article 8. The judge did precisely that. It is perfectly clear that the judge had regard to the statutory guidance in Section 117B of the Nationality, Immigration and Asylum Act 2002. It was not necessary for the judge to set out each and every factor. What was required was for the judge to consider that section. It is clear (and Ms Everett quite rightly did not seek to persuade me otherwise) that the judge had done precisely that).

17. The grounds point to Mr Nwagbara having no legitimate expectation of continuing his private life in the United Kingdom, his quintessentially precarious status and the fact that fresh application could be made from outside the United Kingdom or in the alternative for Mr Nwagbara and his new partner could continue family life such as it is in Nigeria.

18. Given the reference to paragraph 353B and the possibility that the Judge had in some way considered that there was some notion of legitimate expectation created in the mind of Mr Nwagbara, I understand why the Secretary of State brought this appeal. However it is of note that the

Judge expressly stated, “I would nevertheless on balance agree with the [Secretary of State] that the circumstances of the previous grant are not exactly the same such that the decision not to extend discretionary leave on the same basis can be justified”. However that did not preclude the Judge from looking at all the factors favourable to Mr Nwagbara and giving to them such weight as was appropriate within the context of the additional statutory constraints.

19. The Judge was entitled to find that all ties had been broken, as indeed he did, and consider the wider application of Article 8 in the alternative to 276ADE. Reference to 353B is not material for the reasons set out in paragraph 10. In short whilst reference to the paragraph 353B is surprising, the appeal was not allowed because of that rule but by reference to certain of those factors capable of being relevant to an Article 8 balancing exercise. The same is true of 276ADE, in other words the Judge looked to immigration rules and considered what factors taken together are considered favourable by the Secretary of State. The Judge then proceeded on the basis the all of the requirements of the particular rules were not met ie Appendix FM and 276ADE but accepting, as he did, that this particular Appellant to the First-tier Tribunal had built up his whole life in the United Kingdom, and was in good employment with a steady relationship found, even if generously, that the balance was in favour of Mr Nwagbara.

20. That other judges may have come to a different view is not the test. This Judge’s decision cannot be said to be perverse nor irrational. He heard the evidence. He had the opportunity to form an impression of Mr Nwagbara and guided by the principles in ***R (Iran) [2005] EWCA Civ 982,*** there is in my judgment no sufficient basis for interfering with the decision. It cannot be said, as was suggested in ***Gulshan***, that this judge went on a frolic of his own.

Decision

The Secretary of State’s appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal is affirmed.

Signed **Date 30 January 2015**

Deputy Judge of the Upper Tribunal