



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/16526/2010

THE IMMIGRATION ACTS

Heard at Field House
On 15 October 2015

Decision and Reasons Promulgated
On 22 October 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

and

Abiola Fausat Abeje Olutosin
[No anonymity direction made]

Appellant

Claimant

Representation:

For the claimant: Not represented
For the appellant: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, Abiola Fausat Abeje Olutosin, date of birth 17.10.58, is a citizen of Nigeria.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Whalan promulgated 16.10.14, dismissing, on immigration grounds but allowing on private life human rights grounds, the claimant's appeal against the decision of the Secretary of State, dated 7.3.10, to refuse leave to remain (LTR) in the

UK on the basis of long residence and on human rights grounds. The Judge heard the appeal on 1.9.14.

3. Designated Immigration Judge McClure granted permission to appeal on 15.5.10.
4. Thus the matter came before me on 15.9.15 as an appeal in the Upper Tribunal. For the reasons set out in my error of law decision, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Whalan to be set aside and remade before me in the Upper Tribunal.
5. The First-tier Tribunal Judge found at §32 that the claimant could not meet the long residence provisions and found at §35 that the claimant had not demonstrated the existence of relevant family life in the UK. There was no appeal or cross appeal against those findings and that part of the decision. Therefore, in adjourning for the continuation of the hearing to remake the appeal I preserved the findings and decision of the First-tier Tribunal on immigration grounds and in respect of family life outside the Rules under article 8 ECHR and they must stand as made.
6. Thus the matter came back before me on 15.10.15, with the single issue being that of private life outside the Rules on the basis of article 8 ECHR.
7. There was no attendance or representation on behalf of the claimant at the continuation hearing before me. Very late in the day, received by the Tribunal only on 12.10.15, despite the length of time they have had to consider the error of law decision, the claimant's representatives requested that the continuation hearing should be vacated, should not be heard by myself, and that the case should be remitted to the First-tier Tribunal. They sought to raise this tardy request as a 'preliminary issue,' stating that, "a careful examination of part judgement shows that the Judge has already made up his mind and as such the case should be heard by another Judge. Deputy Upper Tribunal Judge Pickup has already expressed a near concluded view namely that it would be difficult to show that exclusion would be disproportionate because she has been outside the country for five years."
8. The claimant's representatives did not have the courtesy to attend the hearing. Their letter was put before me on the day of the hearing. I refused the application. As noted at §20 of the error of law decision, the claimant's representative agreed with the submission of the Secretary of State's representative that the appeal should remain in the Upper Tribunal. There is thus no merit in the request to remit the matter to the First-tier Tribunal.
9. The only reason for adjourning the remaking of the decision, rather than dealing with it at the hearing on 15.9.15, was the request by the claimant's representative, Mr Gold, to adduce some further evidence as to the claimant's private life to include the intervening period between her removal from the UK in 2010 and the present day. At that time, I considered that such evidence was arguably relevant to the remaking of the decision. At §19 I left open for further submission the extent to which the Tribunal should take into account the claimant's private life in the now 5 years since she was removed from the UK. It was arguable that the Tribunal should have

considered the private life circumstances at the date of hearing and not simply focused on the private life developed in the UK up to the date of her removal in 2010.

10. I thus gave directions, confining the remaking of the decision in the appeal to the issue of private life outside the Rules on the basis of article 8 ECHR, and directed that the claimant lodge any further evidence by way of a single consolidated, indexed and paginated bundle all objective and subjective evidence to be relied on. There has been no compliance with that direction and no bundle or any additional evidence at all has been received. Neither the claimant nor her representatives have made any further submissions on the issue as to what period the private life should be assessed on. It follows that adjourning the remaking of the decision has proved to be a rather pointless and unnecessary exercise.
11. Further, I see no basis to recuse myself from remaking the decision in the appeal. First, it is impracticable if not impossible to decide whether the alleged errors of law in the making of the decision of the First-tier Tribunal are made out without in the process expressing a view as to the merits of those arguments. Second, in any event, I find no expressed view in my error of law decision to the alleged effect that, "it would be difficult to show that exclusion would be disproportionate because she has been outside the country for five years." That phrase does not appear in my decision.
12. In the circumstances, I considered that it was in the interests of justice to proceed with the listed continuation hearing, for which court time had been allocated and for which Mr Wilding had prepared his submissions.
13. Before reaching any of my findings and conclusions in this case I have carefully considered all of the material in the papers before me and taken into account the submissions presented at the hearing on behalf of the Secretary of State.
14. I also note that the claimant remains outside the UK, settled in Nigeria. She made no application to return to the UK for the purpose of her appeal, or to give evidence by video link. The only witness statement I have for her is that dated 24.2.12. There is no evidence addressing her current circumstances in Nigeria. I have only those material put before the First-tier Tribunal on which to assess the claimant's case.
15. As referred to in my error of law decision, there is a convoluted history to the claimant's time in the UK. It is important to ascertain the true nature of the claimant's status during periods of time she has spent living in the UK. I must take into account that she has an appalling immigration history.
16. On 24.6.07 the claimant was refused leave to enter at port when she arrived from Nigeria on the basis of a valid visit visa issued to her in Nigeria. She claimed that she was going on to the USA where two of her children live. On questioning, it became clear that she had two children living in the UK, neither of whom had any lawful immigration status. In fact, the claimant first came to the UK in 1987 and has contrived by various means to remain here for lengthy periods, interspersed by returns to Nigeria. She overstayed a visit visa in 1998, remaining through to 2010. Her son was born her in 1999 and her daughter joined her from Nigeria in 2000. In 2003 she was granted 3 years' discretionary leave to remain outside the Rules.

17. An application for indefinite leave to remain was refused in October 2009 and a further application on the same basis was refused in March 2010. As Judge Whalan explained at §6 the appeal was marked as having been lodged out of time and an application for extension of time was refused. The claimant then lodged an application for judicial review, resulting in an injunction preventing her removal. However the Judicial Review application was refused in May 2010 and the injunction lifted. In consequence, the claimant was removed from the UK on 27.5.10, as the Secretary of State was entitled to do, and has not returned since.
18. Further Judicial Review proceedings were lodged, but in January 2013, by consent, the JR application was withdrawn on the Secretary of State agreeing to reconsider the application for an extension of time on her appeal against the decision of the Secretary of State of 7.3.10. Time was extended and the claimant's appeal was eventually listed before Judge Whalan on 1.9.14.
19. It is important to note that when the claimant was refused admission at port on 24.6.07, it was on the basis that she was seeking entry for a purpose other than that for which the visit visa had been issued. The claimant's period of discretionary leave outside the Rules had lapsed in 2006. She attempted to deceive immigration authorities into letting her back into the UK by applying for a visit visa, stating that she was transiting to the USA to visit her children there, when in fact she had been living in the UK on and off, largely without leave, working illegally, buying a house and living to all intents and purposes as if she were settled in the UK. In those circumstances, the claimant was refused admission but granted temporary admission for a period of two weeks only. Since that date she had no leave to enter the UK and that was her status when she applied unsuccessfully for leave to remain in 2009. Her eventual removal in 2010 was delayed by various Judicial Review applications.
20. In summary, the appeal that is the subject matter of these proceedings is against the decision of the Secretary of State, dated 7.3.10, on the claimant's application of 27.10.09. The Secretary of State's decision is not a refusal of leave to remain, but a further refusal of leave to enter, as is made clear in the notice of immigration decision of 7.3.10, because the claimant never had leave to enter since being refused in 2007.
21. Under section 82(2)(a) of the 2002 Act, there is a right of appeal against an immigration decision which is a refusal of leave to enter. Section 85(4) provides that on an appeal under section 82(1) the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision, subject only to the exceptions in section 85A(3), neither of which apply. It follows that although the claimant is outside the UK, this is an in-country appeal (confusingly given an OA case reference) and the Tribunal should consider the circumstances appertaining at the date of this hearing, in other words the private life the claimant is continuing in Nigeria over the past 5 years. The Tribunal is not restricted to considering the claimant's private life at the date of the refusal decision in March 2010, when the claimant was still in the UK.

22. It is not clear why the 14 year long residence Rule was argued before or considered at all in the First-tier Tribunal. Irrespective of the lengthy periods of absence breaking the continuity of residence, a long residence application is a route for leave to remain, not open to a person who has been refused leave to enter. Pursuant to section 88(2)(d) a person may not appeal under section 82(1) against an immigration decision taken on the grounds that he is seeking to enter or remain in the UK for a purpose other than one for which entry or remaining is permitted in accordance with Immigration Rules. However, section 88(4) permits an appeal on human rights grounds in the same circumstances. The claimant made her human rights representations to the Secretary of State from within the UK and before the decision was made, and thus under section 92(3) she may bring an appeal against a refusal of leave to enter the UK, on human rights grounds.
23. As stated, above no further evidence has been adduced and the claimant's witness statement is dated February 2012. However, it is clear from the above chronology that the claimant has an appalling immigration history. She has contrived to circumvent immigration rules and immigration control by remaining in the UK on and off for over 20 years. But for her period of discretionary leave between 2003 and 2006, she has been living in the UK without leave and unlawfully, entering on various visit visas issued to her in Nigeria on the pretence that she had previously left the UK within the 6 months limit of such leave and the false assertion that she intended no more than a short family visit and would leave by the expiry of her limited leave. In those circumstances, she could have had no legitimate entitlement or expectation of being able to remain in the UK. During these periods of unlawful presence, the claimant has worked illegally, purchased her council home, claimed state benefits, and lived as though she were settled lawfully in the UK, until she was caught out in a lie in 2007. All of any private life developed in the UK was whilst her status was entirely precarious and, for the most part, unlawful. It would be a travesty to describe her as a "law-abiding tax paying citizen of impeccable character," as she does at §12 of her witness statement.
24. The claimant does not meet the requirements of the Rules for leave to enter. Before going on to consider her claim outside the Rules on the basis of private life under article 8 ECHR, I have to consider whether there are any compelling circumstances justifying granting leave to enter when she cannot meet the Rules and has in fact flouted and evaded the requirements of immigration control. I take into account everything set out in the papers before me that may assist the appellant and accept that over a lengthy period, many years, she developed a substantial private life in the UK, one to which she was for the most part not entitled. In particular, I bear in mind her son was born in the UK and apparently two children still live here. There are also other family members here. She claims to be a businesswoman, buying commodities from all over the world for resale in the UK. However, she was not entitled to set up or run any business from the UK. I also accept that she will have established many social and business contacts with individuals, groups and others as a single mother of five children, as claimed in §12 of her witness statement. She has had long exposure to British culture and heritage. In my view, none of these circumstances or the other factors set out in the various papers before me amount to compelling circumstances. The situation is certainly extraordinary, and it is amazing that she

managed to live here 'below the radar' for such a lengthy period, but it is not compelling and certainly does not justify granting leave to enter outside the Rules.

25. Even if I were to consider article 8 ECHR outside the Rules, applying the Razgar stepped approach to her claimed private life, of which the crucial factor is proportionality, I find, for the reasons set out herein that the decision of the Secretary of State is entirely proportionate and not disproportionate to her private life.
26. In considering the proportionality of the decision to refuse leave to enter, I am required to consider the public interest consideration of section 117B of the 2002 Act, in particular that immigration control is in the public interest and the limited weight to be given to a private life developed in the UK whilst a person's immigration status is precarious. As AM (Malawi) held, "A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave." Whatever the true chronology of the claimant's disputed absences and returns to the UK, it must follow that she was either unlawfully present, or, at the very least, her immigration status was precarious. This is highly relevant to the proportionality assessment. As held in Dube (ss117A-117D) [2015] UKUT 00090 (IAC), judges are duty-bound to "have regard" to the specific considerations. The claimant can derive no assistance from the claimed command of English or alleged financial independence. As emphasised in AM (s117B) Malawi [2015] UKUT 0260 (IAC), "An appellant can obtain no positive right to a grant of leave to remain from either s117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources."
27. Further, on the basis of Nasim & ors [2014] UKUT 00025, article 8 is not intended to protect the private life of a person in the claimant's circumstances. The decision does not impinge on her moral or physical integrity. More significantly, she has been able over the past five years to live within Nigeria and in reality the private life that I have to consider is not in the UK at all. There is nothing before me to suggest that she was not able to replicate and continue her private life in Nigeria, even if living conditions may not be as comfortable as those in the UK. I am not satisfied that the core private life of the claimant is in fact engaged at all on the facts of this case.
28. The principle that a person whose immigration status is precarious does in normal circumstances develop a private life protected by article 8 ECHR was established in Nasim, where the Upper Tribunal considered whether the hypothetical removal of the 22 PBS claimants, pursuant to the decision to refuse to vary leave, would violate the UK's obligations under article 8 ECHR. Whilst each case must be determined on its merits, the Tribunal noted that the judgements of the Supreme Court in Patel and Others v SSHD [2013] UKSC 72, "serve to re-focus attention on the nature and purpose of article 8 of the ECHR and, in particular, to recognise that article's limited utility in private life cases that are far removed from the protection of an individual's moral and physical integrity." The panel considered at length article 8 in the context of work and studies. The respondent's case was that none of the appellants could demonstrate removal would have such grave consequences as to engage article 8. §57 of Patel stated, "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave

to remain outside the rules, which may be unrelated to any protected human right... 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."

29. At §14 of Nasim [2014], the panel stated:

"Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control."

30. The panel pointed out that at this point on the continuum,

"the essential elements of the private life relied on will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country, (§15)" and (§20) recognised "its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached)."

31. In the circumstances, I find both that the core private life of the claimant is not engaged and that even if it were engaged, the decision is not disproportionate given the background and history and circumstances summarised above, including her claim to have no family or property in Nigeria and that she has survived by living with a succession of friends in difficult circumstances, of which there is no satisfactory evidence other than the claim. There is a strong public interest in maintaining immigration control and those factors that may be deployed in the claimant's favour cannot and do not outweigh that public interest, particularly given the claimant's immigration history. The claimant has failed to demonstrate that her core private life is engaged on the facts of this case, particularly when considered at the present date.

32. As stated above, there was no appeal or cross appeal in relation to the decision dismissing the appeal on immigration grounds and in respect of family life under article 8, and those parts of the decision must stand as made.

33. For the reasons set out above, the appeal must fail on both immigration and human rights grounds.

Decision:

The appeal is dismissed on all grounds.



Signed

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an anonymity order. Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed and thus there can be no fee award.



Signed

Deputy Upper Tribunal Judge Pickup