Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/32030/2015
IA/32039/2015
IA/32045/2015
IA/32054/2015

THE IMMIGRATION ACTS

Heard at Glasgow
on 4 July 2016

Determination issued
on 22 July 2016

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

O S IBIKUNLE, + wife and two children
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms L Irvine, Advocate; Drummond Miller, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are husband, wife and two young children, all citizens of Nigeria. The cases all turn on the outcome in respect of the first appellant.

2. The first appellant entered the UK as a student on 1 January 2010. A further application to remain as such was refused on 19 May 2015. Following an administrative review, that decision was maintained on 2 June 2015.

3. An application was then submitted to remain on human rights grounds, that is to say, outwith the terms of the immigration rules. The respondent refused that application on 15 September 2015. The respondent considered the circumstances by

reference to the rules regarding the partner route, the parent route, and private life, and found no basis on which leave might be granted. Turning to "exceptional circumstances", outside the rules, the respondent said:

> … you have requested that you be granted leave outside the rules to enable you to continue your studies in the UK…
>
> Article 2 of protocol 1 – the right to education – of the ECHR does not obligate the state to provide education to foreign nationals with no legal basis to remain here. There is nothing to prevent you from availing yourself of the educational services in your own country or elsewhere.
>
> It would also undermine the purposes of the immigration system relating to tier 4 general students should you be granted leave to remain outside the rules ... Exercising discretion in your favour… would be to treat you in a more favourable manner compared to other persons who are either in a similar position and have been refused leave to remain or who can meet the requirements for leave under the Tier 4 general student rules.
>
> … This decision is… Reasonable and in accordance with the United Kingdom's obligations ['s with respect to] the best interests of the child…
>
> [Various considerations are narrated to explain that the decision is consistent with proper regard for the best interests of the children].

4. The appellant appealed to the first-tier tribunal against the decision of 15 September 2015, stating the following grounds:

> The decision is unlawful under section 6 of the Human Rights Act 1998. The decision is a disproportionate breach of the appellant's private life as protected by article 8 ECHR. The appellant relies upon *OA (Nigeria) v SSHD* [2008] EWCA Civ 982 … He should be granted a form of leave under article 8 in order to allow him to complete his PhD studies in the UK due to the exceptional nature of his research – see letter of support from Dr Alan Cuthbertson, 14th June 25.

5. The ground of appeal on which permission was sought and granted to appeal to the upper tribunal is exactly the same. It relies on an article 8 private life interest in respect of the first appellant's studies only. No application was made to amend or widen those grounds. Although some further features of the case were mentioned, there is no conceivable basis on which the case might succeed in terms of the appellants' private and family life in the UK, other than the first appellant's interest in completing his studies. I emphasise that point again at the end of this decision.

6. First-tier tribunal judge Fox dismissed the appellant's appeal by decision promulgated on 22 December 2015. In the preparation of his decision, something went badly wrong. There is a narration of the family details at paragraph 1 but the rest of the decision is garbled and irrelevant. Perhaps some error resulted in the issue of a very preliminary draft as if it were final. The respondent conceded that there was error of law and that an entirely fresh decision was required.

7. I raised the question whether this may be one of those instances where appellants have the option of withdrawing the appeal and using a 28 days period of grace to make a further application in compliance with the immigration rules. However,

representatives concurred that such a procedural option would not be open to the appellants and that they could not make any other application for the respondent's consideration without leaving the UK.

8. The first appellant's good academic and immigration history to 20 May 2015 is undisputed. His explanation for the failure of the application under the rules is that the necessary funds were held in the bank account of his wife (the second appellant) and not in his. He says at paragraph 5 of his paragraph 9 of his statement dated 20 November 2015 that on the failure of his application, he was unable to proceed further with his studies in Heriot Watt University. It was suggested that he might complete his course at the Dubai campus or Malaysia campus but this was impractical because he had a custom-made laboratory in Edinburgh and facilities could not be duplicated elsewhere. Nor was it possible for him to arrange to finish his programme from Nigeria. He did discuss with the University legal department making a fresh application within the 28 day period, but he was advised that this would not succeed, although the University did not tell him the exact reason (and none is apparent from his evidence) (paragraph 12). His research would be valuable to the university and to the UK in general, letters to which effect have been provided by supervisors. He states at paragraph 15 that would not be possible to leave the UK to make an entry clearance application, because they would no longer be able to meet the financial requirements, and it would "not be possible to uproot my three young children from the UK at such short notice". The statement also refers to longer term academic and employment prospects in the UK.

9. Ms Irvine said that the preference of the appellants was for their case to be decided in the upper tribunal without further delay. There was no change in the essential underlying circumstances (which are not in any significant dispute). The appellant had been able in the meantime to work on his thesis, but he was unable to have it examined, and to complete it he needed access to laboratory. That was not possible unless he had a grant of leave. The predicted period for completion was six months.

10. The argument for the appellants as set out in a written note of argument and as amplified in oral submissions by Ms Irvine is along the following lines. The issue was "whether or not the refusal of the appellant's application for leave to remain in the UK solely in order to complete his PhD studies is a proportionate interference with his right to respect for private and family life under article 8 of the ECHR". The appellant has a scholarship from Heriot Watt University which over the period of its grant covers both tuition fees and course -related expenses; the amount of tuition fees paid by University would total just over £42,000. The University would also build a customised laboratory for the appellant. The only reason for refusing the application in 2015 related to funds which were shown in the bank statements but were those of the appellant's spouse. When seeking further leave outside the rules, the appellant pointed out that "evidential flexibility" might have been exercised by the respondent in relation to the earlier application, but no request for further evidence had been made. The covering letter also noted that the effect of the refusal would be for the appellant to have lost his entire investment of close to £80,000 over the course of his

PhD studies, and that there would be "irreparable consequences for his life and the life lives of his family members".

11. It was accepted that it would be a rare case in which an application by a student for leave to remain on article 8 grounds would be successful. It was also accepted that there is no sliding scale related to how closely the application came to the requirements of the immigration rules. The factors in favour of the appellant were (1) the value which may attach to his studies in Scotland for the wider community, as shown by the letter from his supervisor (improved prediction of coastal erosion); (2) the substantial cost of the appellant studies to the publicly funded Heriot Watt University, the figure of £42,000 cited not taking into account the cost of customising the laboratory; (3) the refusal of the earlier application due only to genuine error on the part of the appellants, but repeated "because of an earlier error on the part of the respondent herself" (it is said that in an earlier successful application the funds had also been the wife's name); (4) the appellant's investment of intellect, time and money over and above that University; (5) finally and most significantly, the appellant could not complete his PhD unless given access to the customised laboratory at Heriot Watt University in Edinburgh which could not be replicated elsewhere. The only factors on the respondent's side were the maintenance of the integrity of the rules, and being seen not to treat the appellant more favourably than other applicants. Those requirements might have been relaxed if respondent had exercised evidential flexibility which she was required in certain circumstances to do.

12. Ms Irvine said that if the appeals failed and the appellants left voluntarily, they would be subject to a 12 month ban on return. The academic opportunity was understood to be still available, but after such further lapse of time it might not be. At best, the first appellant might be able to resume his studies after a delay which would run over 12 months. This was one of those rare student cases which ought to succeed.

13. Mr Matthews in reply said that it was correct that there would be a 12 month re-entry ban. He submitted that was not a factor which should be given significant weight in the appellant's favour. The appellant had the option of making a fresh application in 2015 after adjusting the finances in the bank accounts. There was no explanation why he did not do so. He also had the option then of returning to Nigeria and making a fresh application from there, without restriction on re-entry. By either route, he might by now have completed his studies. It was his decision to take the matter further by way of a human rights application, outside the rules, from within the UK. The consequences were of his own making. It was nothing to the point that an application made in 2012 might have been granted "in error" in the basis of funds in his wife's account. It was his obligation to comply with the terms of the immigration rules in all applications. There was nothing which might have triggered an obligation in terms of evidential flexibility. The system of immigration control should not be set to one side simply because the appellant made a mistake in his application. There was a route for leave to remain in the UK as a student, prescribed by tier 4 of the points-based system. The tenor of some of the evidence and submissions for the

appellants was that they had a general right in terms of private and family life to remain in the longer term in the UK, not simply for purposes of the appellant's studies. Mr Matthews argued that there was no foundation for any such expectation, and that if any leave were to be granted outside the rules, it would be for purposes of completing studies only, and not such as to give rise to any long-term expectations. Turning from the rules for students to the rules for private life, Mr Matthews did not exclude that there might be a student case which did qualify under article 8 of the ECHR, but he emphasised that article 8 is not a general dispensing power, that there was another route that the appellant could have taken, and the private rules were also to be applied, which generally strike the correct balance. The appellant made unlikely assertions that he would have no job and no future in Nigeria. Even if the appellant would not be able to complete his PhD, there was no disproportionate result. There was very nothing in terms of the children's best interests which might affect the outcome. In terms of part 5A of the 2002 Act and the broader article 8 consideration, it was of little significance that the appellants might be financially self-supporting. In *Forman* [2015] UKUT 412 a panel of the UT including the president confirmed that the public interest in firm immigration control was not diluted by the consideration that the article 8 claimant had at no time been a financial burden on the state, was self-sufficient and was likely to remain so indefinitely (paragraph 15). It is well established that there is no right to remain in the UK to study, and that article 8 is not a general dispensing power. The appellant could point to some factors in his favour, but the law in general was entirely against him. It might arguably be a hard case, but things sometimes go wrong, and the reasons for that were the responsibility of the appellant and not of the respondent. The appeal should be dismissed.

14. In reply Ms Irving said the case did include an element of the children's best interests, and that there were long-term consequences which might be adverse for them. However, the crucial features which she emphasised were the inability to replicate facilities for completion of the appellant's PhD elsewhere, and the fact that for practical purposes his PhD could only be obtained through a grant of leave in these proceedings.

15. I reserved my decision.

16. There is no significant dispute about the facts, and little dispute about the law, apart from the matters in the next two paragraphs.

17. It has not been shown that there was in prior procedure any failure by the respondent on the basis of evidential flexibility to give the appellant an opportunity to put matters right.

18. *Forman* was concerned with a long term claim to leave to remain, not with completion of studies. That is an important distinction.

19. Mr Matthews made a reasonable argument that the deficiency in the failed application under the rules was the appellant's responsibility, and that he had

options other than reliance on human rights. He has no comprehensible reason for not applying again within the 28 day period. He might alternatively have put matters right from outside the UK.

20. The foregoing are I think the best points on the respondent's side.

21. The appellant's case has at times strayed into contentions that he and his family may have some claim to stay remain here, based on private and family life, beyond the requirements of the rules and beyond completion of his studies. I regard any such case as entirely hopeless. There is no reason at all why the appellants might not be subject to the rules, apart from that one issue.

22. On that one issue, this is a finely balanced case. The other options available to the appellant may not have been apparent at the time. The advice given to him (by previous advisers, and now with the benefit of hindsight) may not have represented the best option. However, the human rights issue has to be decided as matters presently stand. Subject to my observations above, I find the factors argued in favour of his completing his studies quite strong. Those studies are at a high and useful level, are near to completion, and realistically are not likely to be completed otherwise. There is always a public interest in maintaining immigration control through the rules, but in this case I think it should give way, and that the decisions appealed against represent a disproportionate interference.

23. This decision should give rise to no expectation that the appellants are entitled to remain here, without complying with the immigration rules, for any purpose apart from completion of the first appellant's PhD.

24. The determination of the First-tier Tribunal is set aside. The appeals, as originally brought to the FtT, are **allowed**.

25. No anonymity direction has been requested or made.

Hugh Macleman

8 July 2016
Upper Tribunal Judge Macleman