Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21233/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th June 2015	**On 16th June 2015**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AYOTUNDE OLUWASEUN DAWODU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Ojo (Graceland Solicitors)
For the Respondent: Mr A Melvin (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission, by the Secretary of State in relation to a Decision and Reasons of the First-tier Tribunal (Judge Tiffen) promulgated on 15th January 2015 by which she allowed the Appellant's appeal on Article 8 grounds.

2. For the sake of clarity and continuity I will continue to refer, in this determination, to Mr Dawodu as the Appellant and to the Secretary of State as the Respondent.

3. The Appellant is a national of Nigeria born on 20th April 1987. He entered the United Kingdom in August 2012 as a Tier 4 (General) Student Migrant with leave until 30th January 2014. Before the expiry of that leave he made an application for indefinite leave to remain as a dependent relative of his parents who are in the UK and are naturalised British citizens. Also in January 2014, the Appellant commenced studying for a Ph.D. at the University of Nottingham funded by a scholarship provided jointly by the UK and Chinese governments.

4. On 17th April 2014 the Secretary of State refused the application to vary his leave and also made a decision to remove him to Nigeria. The Appellant appealed and his appeal came before Judge Tiffen on 12th January 2015. On that occasion, as before me, the Appellant was represented by Mr Ojo. Judge Tiffen heard oral evidence from the Appellant and from his father and also took into account the Appellant's and Respondent's bundles. She heard that the Appellant had started studying for his Ph.D. and that his mother had paid £1500 towards accommodation. He said that he regarded his parents' address in Harlow as his home and that he has no home or address in Nigeria. Both of his parents and his two younger siblings are British citizens. On completion of his Ph.D. he proposed to continue working in energy technology and is particularly interested in buildings and improving efficiency and the sustainability of buildings in the United Kingdom.

5. The Appellant's father is a GP and his mother a nurse. One of his brothers is also studying for an MA at Nottingham University and his younger brother has just completed his GCSEs.

6. Judge Tiffen heard evidence that the Appellant's parents supported him financially. The family are all highly educated and anticipate a bright future in the United Kingdom.

7. Judge Tiffen heard that the Appellant previously lived in the United Kingdom and attended school here between the ages of 7 and 10. In 1999 the family returned to Nigeria where the Appellant completed his secondary education and then studied for a degree at the University of Lagos. In 2007 the Appellant's father was granted the right to work and live in the United Kingdom under the highly skilled migrant programme and in 2008 the Appellant's mother and younger siblings joined him in the UK. As the Appellant was at University he remained in Nigeria. He continued to be financially supported by his parents and spent his vacations with them in the UK. Whilst in the Nigeria his father had arranged a guardian for him, a Dr Fashola. He is not a relative but is a friend of his father's. He is still in Lagos.

8. The Judge noted that the application was on Article 8 grounds only, acknowledging that the Appellant did not meet the requirements of the Immigration Rules. The Judge found that the Appellant had a family life in the United Kingdom with his parents and brother and sister and considered that Article 8 was engaged. She also found that he had acquired a private life during his studies in the UK. The Judge then set out various pieces of case law including Ghising (family life-adults-Gurkha policy) [2012] UKUT 00160 (IAC) which indicated that family life could continue

between a parent and an adult child particularly when the child has not established an independent life of his own. She also referred herself to the case of Beoku-Betts [2008] UKHL 38 and Huang [2007] UKHL 11 and the recent guidance in AAO v ECO [2011] EWCA Civ 40 but found that the in this particular case the family had a bond which went beyond normal emotional ties. The Judge's reasons for allowing the appeal are contained in only half of one paragraph [21] where the judge said:-

> "The Appellant's parents have chosen to come to United Kingdom under the highly skilled migrant programme and as such have contributed enormously to the United Kingdom. To deprive them of the ability to provide emotional and family support to the Appellant during his studies is to my mind ungracious. This particular family have clearly adopted the United Kingdom as their home. The Appellant's siblings are studying and will no doubt also contribute to the economic wealth of this country and have become British citizens. The Appellant himself has passed the life in the UK test and has a strong desire to live his life here and contribute to the economic future of the United Kingdom particularly in his chosen field of study".

9. She thus allowed the appeal.

10. The Secretary of State in her grounds challenging that decision asserted that the Judge allow the application outside the rules without any reference whatsoever to section 117A of the Nationality, Immigration and Asylum Act 2002 and thus failed to consider the public interest when assessing proportionality. It is further asserted that the Judge failed to have regard to the current jurisprudence in relation to Article 8 including Nagre [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) and MF(Nigeria)[2013] EWCA Civ 1192. The Judge failed also to consider that the Appellant has the opportunity to study in the UK if he wishes to by satisfying the requirements to achieve a student visa.

11. Before me Mr Ojo sought to defend the decision and he relied on the case of Dube (section 117A – 117D) [2015] UKUT 00090 (IAC) and in particular to paragraph 2 of the head note in which it is stated that "it is not an error of law to fail to refer to section 117A – 117D considerations if the Judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form". I referred Mr Ojo to the case of AM (S117B) Malawi [2015] UKUT 0260 (IAC) which he indicated he had read. He nevertheless conflated the issues of "lawfulness" and "precariousness" relying on the fact that the Appellant had always had leave. I found that the Judge's consideration of Article 8 and her reasons for allowing this appeal woefully inadequate and do not address any of the relevant issues. An "ungracious decision is not disproportionate. In particular the judge completely ignored section 117 A and s.117B and it cannot be said that she took the principles into account albeit without mentioning it. She clearly did not. At no time did the Judge consider the fact that the private and family life that the Appellant had built up in the UK was at a time when he was here on a temporary two-year visa and thus at a time when his status was therefore precarious. I found that the Judge's decision was unsustainable and I set it aside in its entirety

12. Mr Ojo urged me to remit the appeal to the First-tier Tribunal. I declined to do so because there was no good reason to do so. The evidence was unchanged and the matter could proceed on submissions. Furthermore, the London hearing centre where the case was heard in the First-tier Tribunal has extremely long waiting times such that any appeal in the First-tier would be unlikely to be heard this year.

13. Having given Mr Ojo time to explain the position to his clients we proceeded.

14. There was no necessity for the Appellant to give oral evidence and Mr Melvin had no wish to cross-examine either him or his father. The facts were as they were before the First-tier Tribunal and as set out in the Record of Proceedings, the witness statements and the oral evidence. I did clarify that the Appellant's parents' home is in Harlow in Essex.

15. In his submissions Mr Ojo said that while he was in Nigeria completing his studies the Appellant spent every holiday with his family in the United Kingdom. His family life is deeply rooted in the United Kingdom and he has not embarked upon a separate independent life away from his parents. In the UK every holiday from university he spends in the family home and his family ties remain firmly with his parents. He also submitted that if he were removed to Nigeria where he has no family or property, his only home being with his parents in the UK he would be destitute.

16. With regard to exceptional circumstances he said that case law indicated that exceptional circumstances do not have to be one single event but can be a collection of circumstances and in this case the Appellant is in receipt of a scholarship jointly funded by the UK and Chinese governments and that money will be wasted if he is required to leave the UK. Additionally he will be separated from his family, which would have a very damaging effect on him, being unable to see his siblings and his parents. He argued that on the facts of this particular case, the public interest required the Appellant to remain rather than be removed.

17. In response the Home Office Presenting Officer indicated that there would be no possible prospect of the Appellant being destitute on return to Nigeria. He was supported by his family previously when he was there on his own and that could continue. Additionally his guardian remains there to assist him. Furthermore, there is, if he wishes to study for a PhD in the United Kingdom, no reason why he could not make such an application now. He is 28 years of age. His status was precarious at the time he started to study for a PhD and there is nothing compelling or exceptional about the circumstances of this case to render his removal disproportionate. The family chose to make an application for something they knew or ought to have known they could not have.

18. This is a case where the Appellant has applied for leave to remain in the United Kingdom as an adult dependent relative. That is an application which cannot succeed from within the United Kingdom even if he could establish dependency. He

had been in the United Kingdom for a period of two years only when he made his application, some 3 ½ years now. He is now aged 28.

19. In terms of Article 8 outside the Rules, I can see nothing unusual or exceptional that justifies consideration outside the Immigration Rules. However, even if there were, the Appellant could not succeed for the following reasons.

20. This case is about proportionality. The Appellant has accrued a private life in the United Kingdom which includes his studies and also his various relationships. In considering proportionality I am required by section 117A of the Nationality, Immigration and Asylum Act 2002 to take into account the factors contained in section 117B.

21. Section 117B provides:-

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

22. The Appellant can speak English and he has been maintained in full by his parents thus far both of whom are professionals there is no question of him being a burden on the UK.

23. There is no doubt that this family are highly educated, intelligent and hard-working and no doubt an asset to the UK economy. However, that does not obviate the need to comply with UK Immigration Rules. The Appellant's parents made a choice to leave him in Nigeria in 2008. At that time he was 21 years of age and already an adult. They had no qualms about leaving him to study there at university. They had a friend to whom he could turn if needed and they provided financial support for him. Notwithstanding the fact that he spent university holidays in the United Kingdom, the Appellant was essentially living away from his family for a period of four years before he came to the UK. Furthermore, once he came to the United Kingdom he came on the temporary student Visa and could have had no legitimate expectation that would allow him to remain on a permanent basis. He lived in university accommodation rather than with his parents and again notwithstanding the fact that he spent holidays with them, he could not be said to be living with them. He has therefore not lived in the family home since 2008, a period now of seven years. He is 28 years of age, highly educated, highly intelligent and more than capable of living independently. Whilst I appreciate the case law which suggests that Kugathas [2003] EWCA Civ 31 should not be that followed in every case and that it is certainly not the case that a child suddenly becomes independent of his family and can no longer be said to have a family life with them on his 18th birthday. Cases need to be looked at in the round. However, looking at this case in the round the Appellant has lived effectively away from his parents for some seven years now and is indeed rapidly approaching his 30th birthday. It cannot be said in this case therefore that there is any dependency over and above the normal emotional ties between an adult child and his parents. The fact that they are financially supporting him does not alter that. A great many parents continue to provide financial support to their adult children even though they are living away from home. Accordingly, I find that the Appellant cannot be said to enjoy family life as protected by Article 8 with his parents and siblings. That is a direct result of the family's own choices and in particular to leave him in Nigeria in 2008 when they came to the UK.

24. So far as the Appellant's Ph.D. studies are concerned, I do not find this to be a relevant factor influencing the proportionality of removal. There is no human right to study in the UK. He has chosen to embark on a course of study funded by our own and the Chinese governments at a time when his status in the UK was precarious. Indeed, it is rather surprising that the university permitted this. However, be that as it may, it did. However, the Appellant did not make an application to remain in the United Kingdom to pursue his studies, rather he made an application which, given that he is represented he knew or ought to have known could not succeed. He still has the option open to him to make an application to study in the UK. That may well involve his returning to Nigeria to make the application but that will amount to inconvenience rather than any hardship for the Appellant. The family has contacts there including his guardian who can assist him. The suggestion by Mr Ojo that he will be destitute if returned is wholly without merit on the evidence. The family have been supporting him throughout and will continue to do so now as they have in the past.

25. The private life that the Appellant has acquired in the United Kingdom has been built at a time when his status was precarious. He has only ever had a period of limited leave of two years duration and therefore little weight should be attached to that private life in accordance with section 117B (5).

26. While this is a family who will clearly be of benefit to the UK economy and the family, including the Appellant may well prove to be an asset to this country, they can only do so provided they meet the requirements of the Rules. In this case they chose to make an application that could not succeed rather than an application as a student which could have done. That avenue remains open to the Appellant from Nigeria.

27. For the above reasons refusing to vary the Appellant's leave to remain and removing him to Nigeria will not represent a disproportionate breach of his private and family life as protected by articulate ECHR.

28. Accordingly, the Secretary of State's appeal to the Upper Tribunal is allowed with the result that the Appellant's appeal original appeal against the Secretary of State's decision is dismissed.

No anonymity direction is made.

Signed Date 12th June 2015

Upper Tribunal Judge Martin