



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19573/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9th July 2018

Decision & Reasons Promulgated
On 2nd August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

YEWANDE OMOLARA BABASANYA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Singer, Counsel instructed by HRS Solicitors LLP

For the Respondent: Mr Howell, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Widdup promulgated on 25th January 2018 following a hearing at Hatton Cross on 10th January 2018 in which he dismissed the Appellant's human rights appeal.
2. The Appellant in this case is a citizen of Nigeria who was born on 8th March 1991 and who entered the UK in February 2005 initially with a visit visa which was valid until 23rd June 2005. Judge Widdup initially considered the appellant's appeal through the lens of the Immigration Rules, under paragraph 276ADE and found effectively that

there would not be very significant obstacles to the Appellant's reintegration back into life in Nigeria, but went on to find that she had lived in the UK since February 2005, when she was at that stage still just 13, and that since then she had lived with her maternal aunt (her mother's twin sister) who had also looked after her younger brother and sister. He found that the Appellant had entered the UK lawfully with her mother, but then overstayed because her mother had transferred care of the children to her maternal aunt.

3. Judge Widdup at paragraph 35 of the judgment found that the Appellant had said that her degree would be of no benefit to her in Nigeria, because infomatics technology is not used in Nigeria, whereas there are employment opportunities in the UK for someone with that qualification, but Judge Widdup went on to find at paragraph 36 that the Appellant had provided no evidence of the research she had undertaken about jobs in Nigeria for someone with her qualifications and it would have been helpful, he found, if the Appellant had made enquiries about whether infomatics were used in Nigeria. He went on to find that even if there was no demand in Nigeria for someone with her degree it may be possible for her to find work in another field and make use of the degree that she has obtained in another line of employment.
4. The Judge went on to find that the evidence provided by the maternal aunt regarding the circumstances in which the Appellant's mother left her three children with the maternal aunt in 2005 were vague and that the maternal aunt said nothing about her family's circumstances or the visit that the aunt had made back to Nigeria to make enquiries about her sister, the Appellant's mother. As a whole he found that the aunt's evidence was non-detailed and vague. He therefore found that the requirements of paragraph 276ADE(1)(vi) were not met, but then the Judge went on, as he had to do, to consider the circumstances outside the Rules by reference to the five stage **Razgar** test. He accepted that the Appellant had been brought up since 2005 by her aunt who assumed de facto care of her and was, in effect, her mother, and that although the Appellant is now 26 years old she continues to live with her aunt. He found at paragraph 46 that, notwithstanding her age, she had family life with her aunt, and the fact even though she had been to university the Appellant had never actually left her aunt's home to live away from the aunt's home. She had travelled to Tooting for her course. He also found that the siblings also still appear to form part of the family unit.
5. Although in paragraph 50 Judge Widdup found that in assessing proportionality he had to strike a fair balance between the interests of the Appellant and the public interest and made reference to the effect of the Immigration Act 2014 Act and the fact that little weight should be attached to a private life established when the Appellant was living unlawfully in the UK, and made reference to the fact that she does speak English and was likely to be self-sufficient if and when she finds work at paragraph 51.
6. The Judge then went on to find that he had accepted the Appellant had acted responsibly and appropriately in seeking to regularise her status within the UK and that she could not be blamed for the fact that she came to live unlawfully in the UK given her young age at the time. He also found that the delay in what he said was

dealing with this application, but within the Grounds of Appeal it has been put in terms of delay in terms of removal of the Appellant from the UK. The Appellant's life in the UK had been consolidated and that she had spent thirteen years of her life in the UK and therefore a considerable proportion of her life in the UK, but at paragraph 54 he stated:-

"I take all those factors into account but I must also consider the lack of clear evidence about the Appellant's likely circumstances in Nigeria on her return. If there is work available for her which would enable her to make use of her degree and English education she should be able without undue difficulty to establish herself in Nigeria."

7. Judge Widdup then simply went on to state in his Notice of Decision that the appeal was dismissed. The Appellant seeks to appeal against that decision for the reasons set out within the Grounds of Appeal to the Upper Tribunal. Those are a matter of record and are therefore not repeated in their entirety here, but in summary, firstly it is argued that the First-tier Tribunal Judge failed to set out a clear conclusion on proportionality or the balancing exercise in respect of Article 8 of the ECHR, and secondly, that the judge failed to make any clear findings on the impact on the Appellant's removal upon her aunt in light of the judgment of the House of Lords in the case of **Beoku-Betts v SSHD [2008] UKHL 39**.
8. In the third ground of appeal it is argued that the judge failed to consider the jurisprudence upon delay/failure to enforce removal and that it is argued that in the Supreme Court case last year of **Agyarko [2017] UKSC 11** at paragraph 52 that if there was protracted delay in the enforcement of immigration control that the public interest in the removal of a person living in the UK unlawfully was liable to diminish and that the weight to be given to precarious family life is liable to increase. It is argued that the judge failed to properly take that into account.
9. In the fourth ground it was argued that the judge failed to apply the correct standard of proof and it is sought to be argued that it is not clear what standard of proof the judge has applied because he has not referred to one, but it is questioned in the skeleton argument by Mr Singer as to whether or not the judge has sought to apply a standard of proof which is higher than the balance of probabilities.
10. In the Rule 24 reply in this case dated 27th June 2018 the Secretary of State sought to contend that the decision did not reveal any material error of law and it was stated that the judge had undertaken a balancing exercise which although relatively brief, had weighed up all the factors and reached rational conclusions and has given adequate reasons for it. It is argued further within that Rule 24 reply that the Respondent did not accept that the Judge had given proper reasons for finding that there was an ongoing family life between the Appellant and her aunt in the **Kugathas** sense and that further, in respect of the third ground of appeal, it was untenable to suggest that the case discloses a level of tardiness on the part of the Respondent that could possibly have made a difference to the proportionality exercise. In respect of the fourth ground it was argued that although the Judge does not state that the balance of probabilities

is a test that he is applying there is nothing to indicate that a higher standard has been applied.

11. Notwithstanding those arguments raised within the Rule 24 reply, Mr Howell representing the Secretary of State this morning quite properly conceded that in effect although the First-tier Tribunal Judge had set out a number of factors that he was placing on the scales for conducting the balancing exercise, nowhere has he actually reached a reasoned conclusion on the proportionality issue, as to whether or not the decision taken is not proportionate to the legitimate public end sought to be achieved for the purposes of Article 8 of the ECHR. The Judge sets out the positive factors in favour of the Appellant and then in paragraph 54 says he also has to take account of a lack of clear evidence about the Appellant's likely circumstances in Nigeria on her return and stated that "*If there is work available for her which would enable her to make use of her degree and English education she should be able without undue difficulty to establish herself in Nigeria*".
12. However, as Mr Howell quite properly conceded, effectively that is not the Judge indicating that there would be work available for her or that her degree would actually be useful to her in Nigeria. It was simply the fact that he considered there was insufficient evidence in that regard, but simply has not then gone on beyond stating that that is a factor which he has taken into account to actually consider where the balance lies for the purposes of Article 8, other than the fact he has then gone on to dismiss the appeal. Clearly, any decision that is made by a Judge has to be made with adequate and sufficient reasons such that the losing party knows why they have lost. It is fundamental that obviously there are adequate and sufficient reasons in that regard and simply listing factors but without actually conducting the balancing exercise in this case, as Mr Howell quite properly concedes, is a material error of law in this case. There is simply a list of factors but without that balancing exercise being undertaken.
13. The judge also did accept and make findings that the Appellant had family life with her aunt at paragraph 46, but seemingly even though that finding that was not cross-appealed by the Secretary of State, very little reasons were given in terms of any consideration, as to whether or not there was 'family life' in the **Kugathas** sense.
14. In such circumstances, given the concession that the decision does contain a material error of law on behalf of the Secretary of State, I find that the decision of First-tier Tribunal Judge Widdup should be set aside in its entirety. Clearly in this case the balancing exercise is going to have to be done again, and obviously there is going to have to be further evidence taken in terms of the Appellant's situation now.
15. In those circumstances it is appropriate for the case to be remitted back to the First-tier Tribunal for the case to be decided by any First-tier Tribunal Judge other than First-tier Tribunal Judge Widdup.

Notice of Decision

The decision of First-tier Tribunal Judge Widdup does contain material errors of law and is set aside. The case is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Widdup.

No anonymity direction was made by the First-tier Tribunal and no such direction has been sought before me and therefore I do not make any anonymity direction.

Signed

Date 10th July 2018

Handwritten signature in black ink, appearing to read 'RFM McGinty'.

Deputy Upper Tribunal Judge McGinty