



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00949/2013

THE IMMIGRATION ACTS

Heard at Field House
on 20th January 2014

Determination Promulgated
on 19th March 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

OLIVIA ATERI OGEREGA
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Record of Counsel.

For the Respondent: Mr C Avery Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Dean and Mr FT Jamieson JP (hereinafter referred to as 'the Panel') who in a determination promulgated on 8th October 2013 dismissed the Appellant's appeal against the decision to deport her from the United Kingdom.

2. The Appellant arrived in the United Kingdom on 2nd January 1988. She is a Nigerian citizen born in 1968. The appellant was 19 years of age on arrival and was granted a one-month visitor visa valid until 2nd February 1988. The Appellant overstayed and since that date has never been granted leave to remain.
3. On 14th August 1989 the Appellant married a British citizen of Nigerian origin and applied for leave to remain as his spouse although at the same time she applied for leave to remain in the United Kingdom as a student.
4. On 31st May 1990 the Appellant was convicted at Marylebone Magistrates Court of three counts of Obtaining Property by Deception, one count of Using a False Instrument, and one count of Obtaining Pecuniary Advantage. The Appellant was sentenced to 3 months imprisonment for each offence, to run concurrently, suspended for two years. On the same date the Appellant was convicted of a traffic offence and fined £100.
5. On the 15th February 1991 the Appellant was convicted at Marlborough Street Magistrates Court of Attempting/Obtaining and Handling for which she received a 12 month Probation Order of each offence, to run concurrently.
6. On 7th November 1991 the Appellant's application for leave to remain in the United Kingdom as the spouse of a British citizen and as a student were both refused.
7. On 18th October 1993 the Appellant was convicted of what is recorded on the PNC as Foreign Leg/Handling Theft Act 1968 s.22 and Foreign Leg/Using False Instrument, Forgery and Counterfeiting Act 1981 s.3" which is listed as having taken place at the Criminal Court in Ancona, Italy. The Appellant was sentenced to two years six months and fifteen days imprisonment for the first offence together with a fine of 1,500,000 Italian Lira.
8. A notice of intention to deport was issued on 24th March 1994 and her appeal against the decision refused on 14th December 1994.
9. On 12th April 1995 the Appellant was convicted at Harrow Crown Court of eighteen counts of obtaining property by deception and three counts of false accounting for which she was sentenced to two years imprisonment.
10. On 27th October 1995 the Appellant applied for asylum, which was refused on 9th May 1997.
11. On 21st August 1998, at St Albans Crown Court, the Appellant was convicted of conspiracy to defraud and sentenced to thirty months imprisonment and recommended to be deported. The Panel noted that in a letter to the Respondent dated 3rd September 1998, Hertfordshire Constabulary stated the Appellant had

been involved in various deceptions, with others, in which £200,000 had been obtained. A deportation order dated 28th October 1998 was served on the Appellant on 21st November 1998 although for legal reasons it was revoked by the Respondent on 11th September 1999.

12. On 22nd August 1999 the Appellant had applied for leave to remain in the United Kingdom as an overstayer which was refused on 20th May 2003.
13. On 10th January 2002, at West London Magistrates Court, the Appellant was convicted of one count of attempting to obtain property by deception and one count of obtaining property by deception for which she was sentenced to a Community Punishment Order of 150 hours and ordered to pay £1,200 compensation.
14. On 14th May 2003 a deportation decision letter was issued by the Respondent and on 15th May 2003 a deportation order was issued.
15. On 8th December 2003 the Appellant applied for leave to remain in the United Kingdom, relying on Article 8 ECHR, which was refused on 15th December 2003.
16. On 18th February 2004, at West London Magistrates Court, the Appellant was convicted of attempting/obtaining property by deception and handling stolen goods (receiving) and sentenced to a Community Punishment Order of 150 hours.
17. On 12th October 2007 the Respondent advised the Appellant that the deportation order issued in 2003 was being revoked for legal reasons but advised the Appellant that she might still remain liable to deportation.
18. On 10th May 2008, at Medway Magistrates Court, the Appellant was convicted of shoplifting and fined £250. On 24th May 2011, at Woolwich Magistrates Court, the Appellant was convicted of driving a motor vehicle with excess alcohol, fined £125, and disqualified from driving for sixteen months.
19. On 10th March 2013 the Appellant was issued with a notice of liability to deportation together with a questionnaire to which she replied on 10th April 2013. On 25 April 2013 the Respondent made a decision to make a deportation order and it is the appeal against this decision that came before the Panel.
20. An analysis of the PNC shows the Appellant as having thirty nine convictions for fraud or kindred offences, four convictions for theft or kindred offences, three miscellaneous offences, the use of ten alias names, and that her last recorded conviction is 10th May 2011.
21. It was conceded before the Panel, on the Appellant's behalf, that the appeal was being pursued on the substantive grounds relating to her family and private life

under Article 8 ECHR only as it was accepted that the Appellant could not qualify under any of the provisions of the Immigration Rules. It was also stated that although there was medical evidence, no separate claim was being made under Article's 3 or 8 on medical grounds, although that evidence was being relied upon as part of the claim to private life under Article 8 ECHR [18].

22. In relation to her family life, the Panel noted that the Appellant is not married and has no children of her own. She has a sister who lives in Kent who has a son who is now aged 13. It was claimed there are also two sisters living in Scotland although no additional evidence regarding the sisters in Scotland was before the Panel which led to a finding that the claim to have such family members in Scotland was very weak [21]. In relation to the relatives in Kent; it was found that having examined the totality of the evidence the family relationship between the Appellant and her sister is not as close as has been claimed [26]. This finding was made on the basis of evidence containing a different address for the Appellant from that of her sister [26], the lack of sufficient evidence to corroborate the claimed relationship [27], and material inconsistencies between the oral evidence of the Appellant and her sister [28]. The Panel rejected the claim the Appellant lived with her sister [29] and did not accept that she had told the truth before the Tribunal. Her account of the facts was found to be a "narrative of convenience" designed to establish that she had a close family relationship with her sister and nephew which, on the evidence considered in the round, it was found she does not.
23. The Panel found that the relationship between the Appellant and her sister and nephew did not go beyond normal emotional ties between family members [30] and that contact could be maintained by indirect methods if the Appellant was deported.
24. The Panel concluded that as a result, the deportation is be proportionate to the legitimate aim and would not breach Article 8 which is suggestive of legal error but not one material to the decision relating to the lack of family life. I make this observation for if no family life exists it is unnecessary to proceed to consider the remaining elements of the legal test set out in Razgar. The primary finding of the Panel is that it had not been proved that the relationship with the sister and nephew were such that family life recognised by Article 8 was found to exist.
25. The Appellants claim to be in a relationship with a named individual was also found to be affected by conflicting evidence and the lack of suitable evidence proving a close relationship. The Panel found the evidence taken at its highest established they were friends but not that the relationship was capable of being recognised as family life [31]. The Panel also noted that both the Appellant and the named individual accepted that they entered into the friendship in full knowledge of the Appellant's precarious immigration status and the fact she might be removed from the United Kingdom.

26. In relation to private life elements; the Panel noted the immigration history [32], the medical evidence relied upon by the Appellant [33], and the fact that over the period of time she has been in the United Kingdom the Appellant will have established private life [34], before concluding that on the totality of the evidence the private life amounted to no more than ordinary day-to-day life, friendships and education, which it was found could be pursued in Nigeria [34].
27. The primary finding of the panel is therefore that Article 8 is not engaged in relation to either family or private life. The Panel, however, went on to consider the position in the alternative as if Article 8 was engaged in relation to which they found that when balancing the competing interests the decision was proportionate [35].
28. The chronology above shows there have been substantial periods of delay in this matter coming to a hearing and the Panel considered the effect of this in paragraph 36 of the determination. They set out the correct legal self-direction that delay is a factor to be weighed in the balance but that delay will rarely be gross enough to render an otherwise lawful decision unlawful. The Panel note that the Respondent's intention to deport the Appellant was known to her, that she was unable to regularise the status, and that despite having no permission to remain in the United Kingdom after 1991 and knowing that she was at risk of being deported she continued to commit serious criminal offences of deception and dishonesty. The Panel refer to the quality of the private life the Appellant established which would have been enhanced during the period of any delay, but did not find that the delay was such as to make the decision disproportionate. The appeal was therefore dismissed.
29. The grounds challenging that decision allege the credibility assessment is flawed as a result of the Appellant recently suffering a brain haemorrhage which is said to have affected her memory. It is asserted that the assessment of credibility should have considered the evidence especially as a discharge from hospital note of the 10th August 2013 has endorsed upon it "GP please assess this patient for memory problems".
30. There is also a challenge to the weight given by the Panel to other aspects of the evidence which were found to be part of the conclusion of the Panel that there were discrepancies in the evidence.
31. In relation to Article 8 ECHR, it is alleged that the proportionality assessment was not balanced, factors regarding delay in revocation of the deportation before the Panel are significant, reference to the period of delay, and the fact the 'high point' in her convictions was 15 years ago in 1998 .
32. It was accepted there was nothing exceptional about the Appellants case but submitted there are exceptional features such as the total inaction and behaviour

of the Secretary of State and their failure to take any action in relation to the deportation order. It is acknowledged that although offences were committed after the decision to revoke the deportation order was made, it is said those offences are at the lower end of the scale and would not of themselves have triggered an automatic deportation decision.

33. It is also alleged that the principle of deterrence in the public interest assessment is flawed as the Appellant has changed the ways and only committed two minor offences since the revocation decision.

Discussion

34. It is accepted the Appellant has an adverse immigration history together with an adverse record of criminal behaviour and that there has been considerable delay in the Secretary of State taking any appropriate action in relation to this Appellant.
35. The fact there has been delay does not make the deportation decision unlawful such as to mean the Secretary of State cannot deport the Appellant at this stage, although any period of delay will have enabled her to further develop the family and/or private life that she relies upon. The approach taken by the Panel in relation to this element of the appeal has not been shown to be affected by any error of law material to the decision.
36. In relation to the credibility assessment, it is accepted that there is mention in the medical evidence of a request for the Appellant's GP to assess her for any memory problems but there was no evidence before the Panel that this assessment had been undertaken. As a result there was no medical evidence before the Panel to show that the Appellant was suffering from memory problems. The evidence from the Appellant was by witness statements and oral evidence and at the outset of her evidence in chief it is recorded that she sought to rely upon the documents that she had provided with no further questions being asked of her by Miss Record at that stage. The Appellant was thereafter cross-examined and from reading of the transcript of the proceedings, which is in legible form, it appears that the Appellant was able to answer questions put to her as indeed were all the other witnesses.
37. In her submissions to the Panel Miss Record is noted as acknowledging that there are inconsistencies in the account but her main submission was that in general the Appellant had been consistent in the core of her account, indicating the Panel were being asked to put weight upon what the Appellant had stated in evidence and not to reduce such weight as a result of memory issues which, if they exist, must be relevant to all the evidence given and not selective elements deemed to harm her case.

38. It was accepted in submissions before the Upper Tribunal that the panel have produced a detailed determination and, in reality, this is a challenge to the weight the Panel gave to the evidence.
39. The Panel accepted that the Appellant has been receiving medical attention and refer to a letter from her GP handed up at the hearing from the Falmouth Road Group Practice dated 30th September 2013. This letter explains that the Appellant suffered a brain hemorrhage in July 2013. It also states she has suffered from chronic depression since 2003. A number of other issues are mentioned but in relation to the relevance of these matters to the Appellants case the letter only states: "I would appreciate if you take into consideration her tragic circumstances which lead to adverse impact on her physical and mental health problems".
40. Miss Record was asked what she is asking the Upper Tribunal to find in relation to this issue to which she responded by stating that she wanted it to find that the Panel should have made the link between the fact the Appellant could not recall/remember and her medical procedures. It is accepted that all the Panel had in relation to this issue is the earlier evidence and the Appellants own oral replies in which she claimed she could not remember.
41. There are many reasons why a witness may claim they cannot remember when questioned about an issue, many not related to memory issues at all. As there was no medical evidence supporting a claim the Applicant was suffering loss of memory such that reduced weight should be given to the discrepancies in the evidence, it is difficult to see what else the Panel were expected to have done with the material they were asked to consider. In any event, in light of the lack of evidence relating to this aspect of the case it is difficult to postulate that all the unsatisfactory elements of the Appellant's evidence might be explained by such memory loss or what effect, if the same was established, such a disorder had on her evidence.
42. I find the Panel considered the material before them with the required degree of anxious scrutiny and gave adequate reasons for the findings they made. As such the weight to be given to that evidence was a matter for them. It has not been shown such findings are perverse, irrational, or contrary to that evidence.
43. The assessment of any Article 8 rights had to be conducted by the Panel in a properly structured manner and in this respect guidance has now been provided by the Senior Courts and Upper Tribunal and which is summarised in the recent case of Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). In Shahzad it was found that (a) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors, (b) any other rule which has a similar provision will also constitute a complete

code, and (c) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.

44. The Panel failed to follow such an approach as they went forward to consider an “old style” Article 8 ECHR assessment without considering the fact the Rules are a complete code in relation to deportation appeals.
45. It was conceded that the Appellant is unable to meet the requirements of the Rules and so issue for the Panel was to consider what is exceptional about her circumstances such that she is able to succeed. Miss Record submitted that the evidence of adverse circumstances and the impact on the nephew of his aunt being removed satisfies such a requirement. The problem with such a submission is that there was no/insufficient evidence before the Panel to show that the impact upon the child of such an event, even if it was established that the ties were as the Appellant claims, will be such as to make the decision disproportionate. The best interests of the child will no doubt be to remain with his parents and be cared for by them in the UK.
46. I find having reviewed the findings and material in full that no legal error material to the decision to dismiss the appeal on human rights grounds has been made out. The Appellant is unable to satisfy the requirements of the Rules and has not established any arguable basis for finding that circumstances exist, on the evidence, warranting the appeal being allowed outside the Rules. Even if the Appellant has a family life with her sister and nephew and a relationship with the named individual the fact such matters are considered within the Rules and, even if not, are impacted by the fact the Appellant has formed such ties during the time she has no leave to remaining the UK and that the weight to be attached to the same is limited. It is also relevant to note that these are the elements relied upon by the Appellant and not the only matters the Panel were required to consider. As Miss Record noted in her grounds the need is to conduct a balanced assessment and when the same is undertaken, including the Appellant’s history of criminal behaviour which includes offending when she knew she was at risk of deportation, a finding the decision is proportionate to the legitimate aim relied upon is within the range of findings the Panel are entitled to make on the evidence. Even though Miss Record attempts to mitigate the fact the Appellant offended after the deportation decision was revoked by reference to the fact the offences were at the lower end of the scale, she recognises there were further offences. This demonstrated a continued propensity to commit offences even when the Appellant must have been aware that to do so made the chance of remaining in the UK even more remote.

Decision

47. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

48. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, as no request for the same was made and nor is the need for such an order established on the facts.

Signed.....

Upper Tribunal Judge Hanson

Dated the 17th March 2014