



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/28537/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4 September 2014**

**Determination
Promulgated
On 9 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AYODELE OLUWAFEMI FALEYE

Respondent

Representation:

For the Appellant/Secretary of State: Mr T Melvin, Home Office Presenting Officer

For the Respondent/Claimant: Mrs M Hannan, Solicitor from Corban Solicitors

DECISION AND REASONS

1. The claimant, Mr Faley, whom I shall refer to as the appellant as he was before the First-tier Tribunal, is a citizen of Nigeria and his date of birth is 12 June 1980. The appellant entered the UK in 2008 as a student and he had been granted further leave to remain as a Tier 1 (Post-Study Work)

Migrant. On 17 May 2012 he made an application to vary his leave to remain in the UK based on his private and family life here in the UK. The application was refused by the Secretary of State on 1 July 2013. The Secretary of State considered the application under appendix FM of the Immigration Rules (276ADE of the Immigration Rules whether or not there were exceptional circumstances to grant leave outside the Rules).

2. The appellant appealed against the decision of the Secretary of State and his appeal was allowed under article 8 by Judge of the First-tier Tribunal Shamash in a decision which was promulgated on 27 May 2014 following a hearing on 27 February 2014 and 9 May 2014. The Secretary of State was granted permission to appeal against the decision in a decision of Judge Colyer on 16 July 2014. Thus the matter came before me.

The Hearing and the Evidence Before the First-tier Tribunal

3. The appellant's mother and five siblings live in the UK and all but one sibling are British citizens (one sibling has leave to remain in here in the UK). The Judge heard evidence from the appellant, his mother (Mrs Faleye), his sister (Mrs Alabi), his brother (Oluwaradare Faleye) and a pastor. There was medical evidence before the Judge relating to the appellant's elderly mother which established that she has a number of health problems. She is aged 73 and suffers from osteopenia, high blood pressure and she had recently had a parathyroidectomy. The medical evidence was that the appellant performs most of his mother's domestic tasks (cooking, prompting her to take medication, laundry and shopping) and helps her to bathe and provides emotional support to his mother.
4. The evidence from the appellant and his mother and other family members was that the appellant had moved in with his mother in July 2012 when her health deteriorated and he cares for her. His mother came to the UK when she was aged 20 and some of her children were born here and as a result are British citizens. The appellant is supported financially by his sister Mrs Alabi, who is the director of Kip McGrath Education Centre in Grays in Essex. She is unable to take care of her mother because she is self-employed and does not live locally. The appellant's brother could not take care of his mother because he is employed and resides with his family. There were witness statements from other family members all of whom asserted that they were unable to take care of the appellant's mother because of their own family and work commitments. The evidence was that the appellant did not have family members in Nigeria. He would not have family support and would be isolated from the rest of his family. The Judge accepted the evidence and found the appellant and witnesses to be credible.
5. The Judge made the following findings:

“32. In this case I accept the basic factual matrix which is that the appellant's mother and father settled in the United Kingdom in

the 1960s and that three of their children were born here in the United Kingdom and the other three in Nigeria. All of the children now live outside Nigeria. Were the appellant to return he would be left returning on his own to Nigeria.

33. I have not gone on to consider paragraph 276ADE because this provision postdates the application and is not relevant. The appellant would in my view have had difficulty establishing that he met 276ADE(vi). He left Nigeria in 2008 and there was insufficient evidence before me of the situation for this appellant from the age of 17 until 2008. There was also insufficient evidence before me to establish even on the balance of probabilities that the appellant has no ties with Nigeria. I make this observation despite the fact that I accept that his close family live in the United Kingdom.
35. On the facts of this case I find that there is family life. I find that the appellant lives with his elderly mother and that he cares for her. I find adopting the test in **Kugathas** that there is sufficient evidence of additional dependency, principally between the appellant and his mother to engage Article 8, but it note that the threshold for establishing that there has been an interference in the right to family life is not high, and the fact that all of the appellant's siblings live in the United Kingdom is not insignificant. I make this finding on the basis that, when considering family life, I must of course consider how a decision that I take will impact on each of the family members not just on the appellant. This is part of the exercise that I am obliged to undertake under proportionality.
36. The appellant does not meet the rules and the respondent's decision is therefore in accordance with the law. I need to consider whether the interference is justified in order to maintain immigration control and for the economic wellbeing of the country and whether these facts outweigh the right to family life that exists between this appellant, his mother and his siblings. I should say at the outset that although the appellant has a close relationship with his siblings, were it not for the care that he affords his mother, I would be dismissing his appeal. This has been a difficult and borderline appeal and there are factors which I have considered that weigh against the appellant. For example there are other siblings living in the United Kingdom who might well take on the task of caring for the appellant's mother if he was not here. Mrs Faleye's health is compromised but she is by no means critically ill. This said, there are a number of factors which when taken together lead me to find that a decision to remove this appellant would be disproportionate. The main factor which has weighed on my mind is that the appellant's mother is getting older and as she gets older she will need more

and more care from family members. The provision of care is available from the State but it could only be afforded at a significant cost. I accept that care from family members when available is preferable both for the State and for the patient/elderly person.

37. Whilst I accept that there are numerous family members in the United Kingdom who could afford care and support, it appears from the evidence and from documentation that the appellant is performing this function and that he is best placed to provide the care she needs in the future. It was put to the appellant that he is caring for his mother to enhance his application, that he had taken on the task expediently. Whilst this may or may not be true, the reality of the situation is that he moved into his mother's house when she needed an operation. The evidence of Pastor Morley was that the appellant enhances his mother's life. I accept this evidence.
38. I do not find that the appellant's mother, Margaret Faleye is acutely unwell however I find that she has a number of conditions which are debilitating and that her general health is likely to deteriorate with age. I understand that as a consequence of her condition that if she falls she is more likely than an ordinary old person to find herself immobile. I find the evidence of Dr Kasinathan that the appellant performs an important function and is registered at the GPs as her carer to be significant. I accept that he assists her to go to church which enhances the quality of her life and was insufficient evidence to establish that the appellant has no ties in Nigeria, I note that the whole family are now living in the United Kingdom. The split in this family which was a consequence of the appellant's parents' move back to Nigeria has had the effect of potentially isolating one sibling. Although he is an adult, he will not have his immediate family around him if he is returned to Nigeria. In the circumstances, taking all of these factors together, I find that a decision to remove the appellant would place the United Kingdom in breach of her obligations under Article 8 ECHR and would be disproportionate."

The Grounds Seeking Permission to Appeal and Oral Submissions

6. The grounds seeking permission assert that the Judge erred in failing to give adequate weight to the availability of alternative care options including that the appellant's siblings could take care of their mother. It is argued that the dependency between the appellant and his mother has come about as a result of choice rather than necessity and therefore can be distinguished from the case of **Kugathas v SSHD [2003] EWCA Civ 31**. It is also argued that the First-tier Tribunal should have had regard to

the Home Office guidance in relation to carers which sets out that leave should only be granted where it is warranted by particularly compelling and compassionate circumstances.

7. I heard oral submissions from both parties. Mr Melvin submitted that as the appeal was allowed simply on the basis that the appellant cares for his mother the Judge should have applied the policy relating to carers. The dependency between the appellant and his mother could be met by other members of the family. There were numerous other family members who could provide care for their mother. The Judge failed to consider the alternative care arrangements that could be available.
8. Mrs Hannan on behalf of the appellant submitted that the appellant made an application under Article 8 of the 1950 Convention on Human Rights and this did not relate to the policy relating to carers. The appellant's mother has several health conditions outlined in the medical evidence. The Judge did consider alternative care arrangements and she based her findings on the relationship between the appellant and his mother and also took into account that should he be removed he would be isolated from the rest of his family.

Conclusions

9. The grounds in my view are limited and do not disclose a material error of law. The Judge considered the appeal under Article 8 outside the Immigration Rules and there was no challenge to this. The challenge appears to be to the finding that there was family life in the **Kugathas** sense, the weight that the Judge attached to evidence and the failure to consider the policy relating to carers. In my view the grounds amount to an attempt to reargue the case and a disagreement with the findings of the Judge. The Judge was entitled to find that there was dependency between the appellant and his mother in the sense of **Kugathas** whether or not this was out of necessity or choice. The Judge was aware of and factored into the balancing exercise that there were other family members in the United Kingdom who could care for and support the appellant's mother (see [37]). However, she found that from the evidence the appellant was the best place to provide care for his mother. There is nothing perverse or irrational about this finding.
10. The application was made under article 8 outside the Rules on the basis of the appellant's private and family life here and the Judge allowed the appeal on this ground. It was not an application for him to remain as a carer in accordance with the policy relating to carers, and as such the guidance was not considered by the decision-maker and it was not raised by the Presenting Officer before the First-tier Tribunal. The Judge found that the caring element of his evidence as determinative of the appeal, but the appeal was allowed under article 8 and there is no reason to believe that the policy applies in this case. It does not follow that because

the appellant could not benefit from the policy, his appeal should be dismissed under article 8.

11. The decision of the First-tier Tribunal to allow the appeal under Article 8 of the 1950 Convention on Human Rights is maintained.

Signed
Joanna McWilliam
September 2014
Deputy Upper Tribunal Judge McWilliam

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