



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

Appeal Number: IA/30329/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 31 July 2014**

**Determination
Promulgated
On 13th Aug 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MS OLUREMI ADENIKE ONOLAJA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss D Revill of Counsel instructed by Anthony Ogunfeibo & Co

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge McDade promulgated on 23 April 2014 in which he dismissed her appeal against the respondent's removal decision made on

3 July 2013. In his decision Judge McDade erroneously identified the basis of the appeal as

“...the Secretary of State’s refusal to allow [the appellant] further leave to remain in the United Kingdom under paragraph 276ADE of the Immigration Rules and/or on Article 8 (family and private) life grounds under the ECHR”

but it is quite plain from the history of this matter that it is the removal decision which forms the basis of the appeal under Section 82(2)(h) of the 2002 Act.

2. The appellant’s position has a complicated history. She came lawfully to the United Kingdom on 12 September 2002 as a student joining her mother and brother to live here and remained here lawfully until 28 February 2011 always as a student. On arrival she would have been almost 19 years old and she is now 32 years old and will be 33 later this year.
3. The appellant applied for further leave to remain as a student in the United Kingdom on 27 February 2011, one day before her existing leave expired, and on 1 August 2011 that leave was refused. She appealed and her appeal rights were exhausted on 4 November 2011.

The Rintoul determination

4. In the present appeal, the appellant did not disclose the decision of Immigration Judge Rintoul (the Rintoul determination) in the First-tier Tribunal in relation to that appeal. There is no doubt in my mind that she should have done so. Whether or not the decision was known to her advisers it was certainly known to the appellant. On a *Devaseelan* basis that decision is the starting point and in relation to family life the relevant passages begin at paragraph 22 and continue to paragraph 32 of the determination.
5. Judge Rintoul accepted that the appellant would have established a private life in the United Kingdom where she had then lived for some nine years although there had been periods during that time when she did not have leave. There was very little evidence before him of private or for that matter family life, no letters of support from friends or from family, save a short letter from her mother dated 22 September 2011 making no mention of any emotional ties to the appellant. That letter relates solely to the fact that the appellant’s mother was responsible for paying the appellant’s fees and at the time the application was made she was short of funds. The only evidence of closer ties was in the appellant’s oral evidence.
6. At paragraphs 25 to 26 of his determination, the judge drew together his findings as to the appellant’s claim to have family life in the United Kingdom:

“The appellant is 29 years of age. While I accept that it appears from the documentary evidence that she lives with her mother it does not necessarily

follow that there still exists between them a protected family life for the purposes of Article 8 of the Human Rights Convention. It is for the appellant to prove that such a protected family life exists and I find that, on the paucity of the evidence before me, I am not satisfied that such a family life exists. I accept that the appellant has studied here and the fact that she has been here for nine years indicates a substantial private life yet beyond her oral evidence and the evidence of her studies there is little or no evidence of its content.”

Judge Rintoul went on to find that removal of the appellant would be proportionate.

The judicial review application

7. The next application made by the appellant, on 10 November 2011, presumably on receipt of Judge Rintoul’s decision, was for further leave to remain in the United Kingdom on Article 8 grounds. On 17 December 2011 the respondent refused to grant her leave on that basis. The appellant subsequently made an application for judicial review of that refusal, issued out of time. The judicial review application was compromised by a consent order at some time during 2013, which recorded that on 1 July 2013, the respondent had made a removal decision attracting an in-country right of appeal, and that the applicant had appealed that decision on 17 July 2013.

Appeal against removal directions

8. The appellant’s grounds of appeal filed on 17 July 2013 were:
 - “1. The decision of the Secretary of State is hasty and unfair in that he has simply taken the view that the appellant does not qualify for leave under new FM Rules and as a result has promptly refused her application without giving proper consideration to her application.
 2. The Secretary of State erred by concluding that the appellant does not meet the requirements of sub-section (vi) of Rule [276ADE] given the lack of ties in her country of origin which formed part of the appellant’s application.
 3. The decision of the Secretary of State in concluding that the facts of this matter are not sufficiently compelling is incorrect given the facts of this aspect of the appellant’s case which was equally put to the Secretary of State.
 4. Contrary to the views expressed by the Secretary of State the Article 8 rights of the appellant, her relationship with her family and the effect of any removal on [her] have not been fully considered especially given the decision in the land mark cases of *Chikwamba v SSHD* and the *Beoku-Betts* case.
 5. More grounds could be settled and lodged in due course.”

It does not appear that any more grounds were settled and/or lodged.

9. That is the appeal which the First-tier Tribunal Judge determined. Unsurprisingly he applied himself to the provisions of paragraph 276ADE which he dealt with very shortly at paragraph 3 and it was not suggested that the appellant was able to bring herself within paragraph 276ADE. The determination did not mention the decision of Sales J (as he then was) in *Nagre, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)* but the First-tier Tribunal Judge expressly considered:

“...whether or not the appellant’s circumstances are compelling and exceptional such that, despite being unable to fulfil the Immigration Rules, she should nonetheless be considered to require protection under Article 8 of the ECHR”

10. The First-tier Tribunal did not refer in his determination to the decision in *Edgehill & Anor v Secretary of State for the Home Department [2014] EWCA Civ 402*, which was published on 1 April 2014. Although the appeal was heard on 2 February 2014, by the time it was promulgated on 23 April 2014 the *Edgehill* judgment should have been taken into account. I am satisfied that the judge erred in law in failing to consider whether this application should have been considered under the old Article 8 test rather than the 276ADE/*Nagre* exceptionality and compassionate circumstances approach which is now appropriate.
11. At paragraphs 4 to 6 of his determination, the First-tier Tribunal judge considered private life and family life. He was unable to treat Judge Rintoul’s decision as the starting point, as ought to have occurred, because the appellant had not put it before him. He considered the family relationships carefully, noting that the appellant and her mother had been economical with the truth about the number of relatives they had in the United Kingdom: after cross-examination, and questions from the Tribunal, the judge found that the appellant had her mother, a maternal uncle, three maternal aunts, and her own brother and his children, all of them living in the United Kingdom.
12. On the evidence, the First-tier Tribunal Judge considered that the relationships between the appellant and her mother, her brother and her nieces and nephews did not indicate *Kugathas* dependency between the parties. Whilst there were clear bonds of natural affection between the appellant and her sibling and mother, they were not such as to amount to evidence of continued family life between them. Despite Miss Revill’s very full submissions I am not satisfied that there is anything therein which was not dealt with adequately in the First-tier Tribunal’s determination.
13. I must also have regard to the statutory changes introduced on 28 July 2014 into the Nationality Immigration and Asylum Act 2002 by s.19 of the Immigration Act 2014. A new Part 5A “Article 8 of the ECHR: public interest considerations” directs the Tribunal as to the approach to be taken to private and family life. The relevant provisions for this appeal are paragraphs 117A and 117B:

“117A Application of this part

- (1) This part applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts
 - (a) breaches a person’s right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under Section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or Tribunal must (in particular) have regard
 - (a) in all cases, to the considerations listed in Section 117B. ...
- (3) In sub-section (2) ‘the public interest question’ means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

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

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

If I find that the errors of law in the First-tier Tribunal determination are such that in principle it should be set aside and remade, I would be obliged to apply those provisions to any remaking of the decision.

14. Miss Revill has correctly pointed out that neither 177B(4) nor 177B(5) with the exception of 177B(4)(b) has any relevance to considerations of family life, and therefore that if family life were to be established between the appellant and her mother, the appellant and her brother, or the appellant and her nieces and nephews the position would be as it was before 28 July 2014. That is plainly right.
15. Neither Judge Rintoul in 2011, nor the First-tier Tribunal judge in the present appeal were satisfied that there the ties of affection and mutual assistance between the appellant and her mother, or the appellant, her brother and his family, were such as to reach the *Kugathas* standard for continuing family life between adults. Miss Revill sought to persuade me that the First-tier Tribunal placed too much weight on the mechanics of the relationships that is, the analysis of the nature of the assistance she gives her mother with hospital appointments and general care and the assistance she gives her brother with the care of her nieces and nephews.

16. Having read the First-tier Tribunal determination, I disagree: the case was put to the Tribunal in that way and the arguments before the First-tier Tribunal were properly considered. I do not consider that the First-tier Tribunal overlooked any material factor in assessing whether there was family life or that the evidence before the First-tier Tribunal, or the fuller evidence (including the determination of Judge Rintoul) on which the determination would have to be remade, establishes a breach of Article 8 in relation to family life.
17. Dealing with the wider issue of private life, while both Judge Rintoul and the First-tier Tribunal in this appeal accepted that there must be some private life, the evidence relied upon was limited to the family relationships between the appellant and her extended family. There is no evidence of any other private life accrued during the many years this appellant has spent studying in the United Kingdom. If there were, on remaking the determination the Upper Tribunal would be obliged to give it little weight, pursuant to sections 117B(4) and (5) if I were to set aside the decision.
18. Drawing together these considerations, I am satisfied that the First-tier Tribunal Judge erred in law in two respects, both of them potentially significant since he has misdirected himself as to the decision which was under appeal and failed to apply his mind to *Edgehill*. However, his consideration of the Article 8 ECHR question is fully and cogently reasoned, arriving at a similar conclusion to that reached by Judge Rintoul in 2011 before either paragraph 276ADE or Appendix FM of the Rules, or Part 5A of the Act, had been introduced.
19. It follows that the errors of law which I have found are not material to the outcome of the appeal. I do not set aside the decision of the First-tier Tribunal.



Signed
Upper Tribunal Judge Gleeson

Date: 12 August 2014