

Upper Tribunal
(Immigration and Asylum
Chamber)
Appeal Number: IA/00817/2014



THE IMMIGRATION ACTS

Heard at: Field House
On: 2nd December 2014

Determination
Promulgated
On: 5th February 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

Fecicia Ocaide James
(no anonymity direction made)

Respondent

Representation

For the Appellant: Mr Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms Browne, Anderson Browne Solicitors

DETERMINATION AND REASONS

1. The Respondent is a national of Nigeria date of birth 18th October 1950. On the 28th August 2014 the First-tier Tribunal (Judge Archer) allowed her appeal against a decision to remove her from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999¹. The Secretary of State now has permission to appeal against that decision².
2. The appeal before the First-tier Tribunal concerned Ms James' application to remain in the United Kingdom on the basis of her established private and family life in the UK. She had last entered the country as a visitor in June 2006 and had been here ever since. The basis of her application, and appeal, was her close relationship with her adult daughter, Beatrice. She asserts that she and Beatrice are

¹ Decision dated 9th December 2013

² Permission granted on the 7th October 2014 by First-tier Tribunal Judge Colyer

dependent upon one another and that if she were to be returned to Nigeria she would be destitute. Although she does have family members in Nigeria, including two adult children, they are struggling financially and would not be able to support her. In the UK she would hope to be able to work and has taken a NVQ in caring. She has other family members to whom she is close including her sisters and brothers and their children.

3. The First-tier Tribunal did not accept that Ms James had lost all ties to Nigeria as required by paragraph 276ADE (vi) of the Rules. She had children of her own there and had lived in that country til she was 56 years old. She had not been here long enough to benefit from any other part of paragraph 276ADE. Turning to consider Article 8 outside of the Rules the Tribunal directed itself that a claimant may succeed in showing a breach of Article 8 where there are “sufficiently compelling” circumstances. The determination notes that the witness statements were unchallenged and that this compelled the Tribunal to accept that there is a relationship between Ms James and Beatrice which goes “beyond the normal relationship a daughter and mother would share”. It further found that Ms James has a strong private life in the UK which encompassed her relationships with her siblings and their children. It found that her removal would be an interference with those Article 8(1) rights and that the Article is engaged. In assessing whether the Secretary of State had shown the decision to be proportionate the Tribunal took into account the “best interests” of unspecified “child relatives”; the delay in dealing with the application and the fact that Ms James had become “increasingly frail and vulnerable” over the years; medical evidence relating to Ms James’ hypertension, hypercholesterolaemia and knee pain and the “dire situation” that she would face in returning to Nigeria. Against that was weighed the fact that Ms James had “overstayed for many years” and that “there is a strong public interest in maintaining an effective system of immigration control”.

The Challenge

4. The grounds of appeal are fairly detailed and in many places appear to amount simply to a disagreement on the facts as found by the First-tier Tribunal. I mean no disrespect to their author in distilling them as follows:

- i) *In assessing proportionality the Tribunal failed to take relevant facts into account:*

In finding that Ms James’ daughter was dependent upon her the Tribunal failed to consider whether other family members in the UK could have taken on that role. In finding that she would face a “dire situation” if returned to Nigeria the Tribunal has not considered whether the same family members who are supporting her financially in the UK could support her

financially in Nigeria.

- ii) *There was a material misdirection in law in that the Tribunal failed to have regard to the terms of ss177A-D of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014)*

This appeal was heard on the 13th August 2014 and as such the terms of section 117B should have been considered. The determination appears to attach significant weight to the relationships that Ms James has established in the UK whilst she has been an overstayer. The statute stipulates that little weight should be attached to such relationships.

Error of Law

5. As I note above, the grounds of appeal come perilously close to re-arguing the case. Issue is taken with findings of fact which were open to the Tribunal, particularly since, it is recorded at paragraph 7 of the determination, there was no challenge to the evidence of any of the witnesses. I am nevertheless satisfied that the decision of the First-tier Tribunal contains errors of law such that it must be set aside. The appeal was allowed on *Razgar* Article 8 grounds and although the determination does refer to the public interest there is no express consideration given to any of the matters set out in s117B. I am further satisfied that the determination contains an error of fact so material as to amount to an error of law: at paragraph 23 the Tribunal appears to attach significant weight to a two year delay on the part of the Respondent, when in fact the decision took no longer than 7 months. Paragraph 22 of the determination places some weight on the best interests of some “child relatives” in the UK: it is unclear why the Appellant’s removal would be contrary to the best interests of these unidentified children or why that should weigh in her favour in the balancing exercise.
6. The decision on Article 8 is therefore set aside. I remake it on the evidence before me. The decision on the Rules was that the appeal was dismissed, the First-tier Tribunal finding that the Appellant cannot meet the requirements of paragraph 276ADE. There is no challenge to that finding and that part of the decision is upheld.

The Re-Made Decision

7. I proceed, as the First-tier Tribunal did, on the basis that the written evidence of the witnesses is unchallenged by the Respondent. The witnesses were available at both the hearing before Judge Archer and myself and were not subject to any challenge in cross-examination. Those witnesses are the Appellant herself and her daughter Beatrice James. I have considered all of the evidence before me and my findings are as follows.

8. The Appellant is now aged 64. She came to the UK on the 13th June 2006 as a visitor and since that time has lived with her daughter Beatrice. Beatrice is a British citizen. The Appellant is supported financially by Beatrice, but also emotionally. The Appellant states that she has no-one to whom she can turn in Nigeria and she is extremely anxious about return there. She has health concerns and is growing older: Beatrice provides her with reassurance and emotional support about these matters. Beatrice herself was made redundant in August 2012 and it is the evidence of her GP that since then she has suffered from “increasing depressive related symptoms”: Dr Rachel Lau writes³ “her mother has been supporting her during this depressive period and Miss James feels that her mother is playing a crucial role towards her recovery, [and] thus feels that her mother’s continued presence is paramount”. Paragraph 5 of the Appellant’s witness statement caused Judge Archer to find that this interdependence did amount to a *Kugathas* family life between the Appellant and her daughter:

“My daughter Beatrice remains my only family, hope and future support. My relationship with my daughter goes beyond the normal relationship a daughter and her mother would share. She is a pillar of support to me and my age means that there is a further vulnerability as far as I am concerned. I enjoy a special relationship with my daughter. Amongst my children she is the closest to me. She has no family of her own and we rely on each other for emotional support. We have a very strong mother-daughter bond”.

I see no reason to depart from that finding and I find that there is a family life in the UK. A number of other relatives, friends and members of the church have written to say how close they are to the Appellant and what a kind, caring and helpful woman she is. I accept that she has also established a private life in the UK in the eight and half years that she has spent here. I find that her removal from the UK would be an interference with these Article 8 (2) rights.

9. Ms Browne did not contest that this decision is one that the Respondent is lawfully entitled to make, nor that the decision to remove persons with no leave to remain in the UK is rationally connected to the Article 8(2) aim of protecting the economy. The only question remaining is proportionality.
10. I am bound by statute to have regard (in particular) to the public interest factors set out in s117B of the NIAA 2002:

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

³ In her letter of 15th March 2013

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.

11. Section 117B(6) has no application in this case. Nor does (2), since the Appellant speaks perfect English. Weighing against her is that the maintenance of immigration control is in the public interest. That is axiomatic and it is a factor that I attach significant weight to. The Appellant came to the UK as a visitor, then overstayed for some 6 years before she made an application to regularise her stay. It follows that little weight can be attached to the relationships she has established as part of her private life in the UK - her friendships with, for instance, members of her church congregation, have all been established when she was in the UK unlawfully and as such they fall to be considered in line with s117B(4)(a). The Appellant was previously financially supported by her daughter, but since Beatrice was made redundant in 2012 the pair have subsisted on Beatrice's state benefits. It cannot therefore in my view be argued that the Appellant is financially self-sufficient. That is a further factor which makes her removal from the UK in the public interest. The factors set out in 117B are not an exhaustive list: that much is illustrated by the use of the term "in particular" in s117 (2)(a). Neither Mr Bramble nor Mr Snowdon (the PO who appeared in the First-tier) identified any other matter than might weigh against this Appellant. She has, as far as we are aware, had no adverse contact with the police and there is no evidence that she has ever worked illegally in the UK. The Respondent's case for the Appellant's removal then rests on the

following submissions:

- i) The Appellant has not, since her leave to enter as a visitor expired in January 2007, had any leave to remain nor any entitlement to be in the UK;
- ii) The private life that she has established since she arrived can only therefore attract a “little” weight in the proportionality balancing exercise;
- iii) Although she has not claimed any state benefits herself she is living off those of her daughter; this is arguably contrary to public policy and means that she cannot properly be regarded as financially self sufficient. The current circumstances of the Appellant and her daughter would suggest that she is likely to make a direct claim for benefits herself should she become so entitled, and this would be an immediate and direct impact on the economy.

For those reasons the Respondent submits that the Appellant’s removal would be proportionate.

12. Against those very weighty factors I must balance the particular circumstances of the Appellant. She is now 64 years old and as I note above it is the unchallenged evidence that she and her adult daughter Beatrice share a bond over and above that normally enjoyed by a mother and her adult children. Unlike the other relationships mentioned in the evidence the Appellant’s relationship with her daughter is not (just) part of the Article 8(1) private life she has established since she arrived in the UK: she has always been close to her daughter and they have shared a family life since Beatrice was born. This is not therefore a relationship that falls under s117B(4)(a). The Appellant expresses fear and anxiety about return to Nigeria where, her witness statement asserts:

“I have no house there and no one I can turn to for accommodation. I have no savings and no money of my own to support myself if I return there; I have no social support network in Nigeria. It may be hard to imagine, but things are not as they used to be where people would accommodate you for free. Things are very tight for everyone now and those that had some free space in their homes, are now renting it out. Rent is required yearly in advance, and that is a responsibility that neither me nor my daughter would be able to handle.

My two children in Nigeria are in no way able to assist me, they are struggling themselves and have already warned my and declared that they are in no position to assist at all...”

13. Beatrice has, understandably, also expressed her distress at the prospect of her mother facing old age in these circumstances. In her witness statement she describes her shock at how “dreadful” her mother looked when she arrived in the UK to attend Beatrice’s graduation ceremony: “life has been unfair to her, she was alone and

neglected in Nigeria". The medical evidence and witnesses all add to this the fact that the Appellant is suffering from a number of medical complaints related to her age: hypertension, hypercholesterolaemia and osteoarthritis. The First-tier Tribunal described these cumulative circumstances as "dire". In the grounds of appeal the Respondent takes issue with that characterisation, pointing out that if the Appellant is being supported by Beatrice and others in the UK they could provide for her in Nigeria. That submission mirrors the requirements of the current rules in Appendix FM relating to admission of elderly dependent relatives. The difficulty is that there is no evidence to the effect that any of the Appellant's relatives here would be able or willing to make remittances to her in Nigeria. In respect of Beatrice the witness statements makes very clear that the couple are managing on her income at present because they live together and are able to share their meagre resources; it would not stretch to maintaining another household in Nigeria. I find that Judge Archer's use of the word "dire" was quite apt. On the basis of the unchallenged witness statements I find that the Appellant would be facing her old age and increasing frailty with no support, no housing and no discernible means of survival.

14. The other side of the coin is that the Appellant and Beatrice have demonstrated an unusual level of emotional dependence upon one another in the UK. Beatrice came to the UK to study, worked hard and got her degree. She thereafter had a number of different jobs but was unfortunately made redundant in 2012. That hit her hard. She has suffered from depression to the extent that the NHS was required to intervene and offer her psychological therapies. Beatrice is quite clear that she would not however have made the recovery that she has were it not for the support of her mother. She expresses a wish to return to paid employment but believes that she would not feel well enough to do this if her mother were to return to Nigeria. Her witness statement sets out the extent of the support her mother has offered her - not just in terms of daily practical issues but, for instance in staying awake with her during her "sleepness and weeping nights".
15. I have weighed all of these factors in the balance. I have attached a great deal of weight to the public interest factors set out above and I have had in mind at all times that the adverse impact of removal must go well beyond inconvenience or preference: the impact must be at a sufficiently high level of seriousness to outweigh the very substantial factor that the Appellant has not, in over seven years, had any right to be in the UK. Having done so I find that on the particular facts of this case the Respondent has not shown the Appellant's removal to be proportionate.

Decisions

16. The determination of the First-tier Tribunal contains errors of law and it is set aside.

17. The decision in the appeal is remade as follows:

“The appeal is dismissed under the Rules.

The appeal is allowed on human rights grounds”.

18. I was not asked to make a direction as to anonymity and I see no reason to do so.

Deputy Upper Tribunal Judge Bruce
1st February

2015