Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37048/2014
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THE IMMIGRATION ACTS

Heard at North Shields
On 5 March 2015
Prepared on 20 March 2015

Determination Promulgated
On 21 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

O. O.
E. I.
L. I.
(ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr Dewison, Home Office Presenting Officer
For the Respondent: Ms Hanan, Corban Solicitors

DECISION AND REASONS

1. The First Respondent, her son the Second Respondent, and her daughter the Third Respondent, are citizens of Nigeria. Both her children were born in the UK, at a time when their mother

was an overstayer. It is accepted that their father is also a citizen of Nigeria, who has no immigration status in the UK. The First Respondent says she believes he is presently living in Nigeria having voluntarily returned there at his own expense to avoid deportation following service of a term of imprisonment, although there is no documentary evidence to that effect.

2. The First Respondent first came to the UK as a visitor on 10 February 2003. She did not obtain a variation of her leave before its expiry. Subsequently she made an application for a grant of leave to remain on the basis of the Article 3 and Article 8 rights of herself and her children on 14 September 2012, but that application was refused on 3 September 2013, and was not appealed.

3. The First Respondent then made a further application for indefinite leave to remain that was refused on 18 August 2014, when removal decisions were also made in relation to both herself and her children.

The appeals

4. The appeals of the Respondents against the immigration decisions of 18 August 2014 were heard on 17 November 2014, when they were allowed under the Immigration Rules in a Determination promulgated on 24 November 2014 by First Tier Tribunal Judge Hands.

5. By a decision of First Tier Tribunal Judge M Davies dated 13 January 2015 the First Tier Tribunal granted the Appellant permission to appeal on the basis it was arguable the Judge had erred in her approach to the requirements of the Immigration Rules.

6. The Respondents have filed no Rule 24 response to the grant of permission.

7. Thus the matter comes before me.

The appeals under the Immigration Rules

8. It was not in dispute before the First Tier Tribunal that the First Respondent was convicted of fraud by false representation on 25 March 2010, and in consequence sentenced to a term of six months imprisonment suspended for a period of two years. The First Respondent accepts that she used “someone else’s national insurance number”. It is clear in my judgement that she was caught dishonestly using a false identity.

9. In consequence the Appellant refused the application of the First Respondent by reference to paragraph 276ADE and to paragraphs S-LTR.1.6. and R-LTRPT.1.1(a-d), 2.2.-2.4., and 3.1.-3.2. of Appendix FM.

10. The Judge's Determination makes no reference to the provision, but it was not disputed before me that the First Respondent could not meet the requirements of paragraph 276ADE. She had not lived in the UK for at least 20 years. Thus, since no other route was open to her, in order to succeed in her application for a grant of leave under the Immigration Rules, the First Respondent needed to show that she met the requirements of Appendix FM. Given her long term status as an overstayer, she could only meet the requirements of R-LTRPT. 2.2.(d) and 3.2. if she could satisfy the test set out in paragraph EX.1.(a)(ii).

> "It would not be reasonable to expect the child to leave the UK"

11. In addition the First Respondent would need to satisfy the requirements of paragraphs S-LTR.1.1-1.7. The Appellant had concluded that she did not satisfy paragraph S-LTR.1.6. because of her conviction. Paragraph S-LTR.1.6. is in the following terms;

> "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3-1.5) character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

12. The Judge's only reference to this provision was at the conclusion of her Determination, as follows [29];

> "… The Appellant's conduct has not been such that it amounts to being not conducive to the public good. I accept she has remained in this country illegally for many years. She was not "in hiding" *per se* as she was enrolled with the NHS and her children were enrolled in education. She does not have associations that make it undesirable for her to remain. She has not displayed a course of conduct that is not conducive to the public good by working for a short period with a forged document, and in any event the courts have dealt with that matter. The Appellant is now well aware of her duties and responsibilities, not only to her children but to the public good of the UK. I am satisfied that S-LTR.1.6 does not apply."

13. This approach to the material facts was in my judgement patently flawed. The First Respondent did not seek to establish before me that the conviction was one that was "spent" under the Rehabilitation of Offenders Act 1974, although that was an argument apparently advanced at the hearing in the First Tier Tribunal by the solicitor then appearing, and accepted by the Judge [28]. It was not however an argument that was dealt with

in the skeleton argument produced in advance of the hearing, or supported by a copy of the Act, or any policy document issued by the Appellant. Nor was it an argument that was supported with the information that would have been required to calculate the date upon which the conviction would become spent under the Act. Neither the date of conviction nor sentence were provided in the written evidence, and thus the date of expiry of the four year period after the conclusion of the sentence period, could not be calculated. More importantly perhaps, no consideration was given to the fact that for the purposes of the Immigration Acts, such a conviction never becomes "spent" because of the exception provisions.

14. It follows that the Judge materially erred in law in allowing the appeals under the Immigration Rules, and that her decision to that effect must be set aside, and remade so as to dismiss the appeals under the Immigration Rules.

15. That being so, the parties invited me to proceed to deal with the Article 8 appeals outside the Immigration Rules. Both were agreed that I would not need to hear further oral evidence in order to do so.

16. It is plain that the decision to remove the Respondents to Nigeria cannot pose an interference in the "family life" they enjoy together, since they would be removed together. There is on their own evidence no "family life" enjoyed at present with the man who has historically filled the role of partner/husband/father, because it is their case that he is currently living in Nigeria. Thus the appeals can only be considered on Article 8 grounds on the basis that the removal decisions constitute interference in the "private lives" of the Respondents. I accept that they would do so.

17. I note the guidance to be found in the decision of the Supreme Court in Patel [2013] UKSC 72. The following statements of principle are relevant;

> "… a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit" [56].
>
> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to

> complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8." [57]

18. There is no need to repeat the immigration history of the Respondents. The First Respondent has been an overstayer since the expiry of her visitor's visa, and the Second and Third Respondents have never had leave to remain. They were conceived and born when their mother was an overstayer, and the only evidence concerning their father, also a citizen of Nigeria, points to his also having been without leave to remain when they were born.

19. On the Judge's findings the Respondents do have an extended family in Nigeria, whether or not they are currently in regular contact with them. The Judge accepted that the father of the Second and Third Respondents no longer wished to pursue a relationship with the Respondents. I see no reason to disturb that finding, but even if that be the case there was no evidence, and no finding, that he wished any of them harm, or that he would fail to assist them in the event of their return. Nor was there any evidence, or any finding, that the members of the extended maternal or paternal families wished any of them harm, or would fail to assist them in the event of their return. The evidence simply does not permit such findings.

20. As the Judge accepted, upon a voluntary return the Respondents would have the benefit of the current financial support package. They cannot be heard to argue that they would be destitute because they would refuse to return voluntarily, and so would fail to benefit from it.

21. The Second and Third Respondents have benefited from education at public expense in the UK, and they are now aged ten and seven years old. The Judge accepted that they did not know Nigeria, but in Nigeria they would be taught in English.

22. Following the guidance to be found in EV (Philippines) [2014] EWCA Civ 874, to which the Judge made no reference, the assessment of the best interests of these children must be made in the context that they and their parents are Nigerian nationals with no right to remain in the UK. I am satisfied that if their father has already left the UK, and if their mother is to be removed from the UK, it is entirely reasonable to expect them to accompany their mother. The Judge's finding to the contrary cannot stand, because it was not made in either the correct factual context, or in the light of the applicable jurisprudence. The children have no right, or legitimate expectation, to education at public expense in the UK, and their best interests are plainly served by growing up with their mother. Indeed upon return to Nigeria they would have

the additional benefit of the ability to grow up within the extended family that remain in that country.

23. There is no suggestion that the children would face any lack of safety in the event of return to Nigeria, and the evidence does not suggest that they would lack any opportunity there. There is no evidential basis upon which I could assume that the education they could obtain in Nigeria would be better or worse than that which they would obtain at public expense in the UK.

24. Moreover the two children have had no right to free medical treatment, or to free education, yet the First Respondent had contrived to obtain both, and has not disclosed how she has done so. She has never had any right to obtain lawful employment, and yet for over ten years, and without disclosing any legitimate source of income, she has somehow supported herself and her children. The First Respondent had been convicted of an offence of deception, arising out of her use of a false identity, for which she was sentenced to a term of imprisonment. Whilst that term had been suspended for a term of two years, it demonstrated that her proven offending behaviour crossed the custody threshold despite her personal circumstances. No doubt her role as a single mother had weighed heavily in the balance with the sentencing judge. Had she been subject to a term of immediate imprisonment, her two children would have been forced into local authority care.

25. For these reasons it is plain in my judgement that the views expressed by the Judge upon whether it is reasonable to expect the children to leave the UK with their mother for a life in Nigeria cannot stand – they were not made in the correct factual context, or after having regard to the correct jurisprudence.

26. Since I am remaking the decision after 28 July 2014 I must have regard to ss117A-D of the 2002 Act. I must (in particular) have regard to the considerations listed in s117B to the 2002 Act in considering whether an interference with a person's right to respect for private life is justified under Article 8(2).

27. I note that the maintenance of effective immigration controls is in the public interest; s117B(1).

28. I note that the Respondents speak English fluently, but they are not financially independent; s117B(2)(3).

29. I note that little weight should be given to a "private life" established by a person when their immigration status is precarious or they are in the UK unlawfully; s117B(4)(5). I am satisfied that at all material times the Respondents have been in the UK unlawfully.

30. I note that the Second Respondent is a "qualifying child", and that the Third Respondent is only a few days short of that qualification. Thus I must consider the test set out in s117B(6) of whether it would be reasonable to expect the children to leave the UK. I can see no distinction between that test, and the one posed by EV which I have answered above.

Conclusions

31. In my consideration of the Article 8 appeal pursued by the Appellant I have to determine the following separate questions:

- Is there an interference with the right to respect for private life (which includes the right to physical and moral integrity) and family life?
- If so will such interference have consequences of such gravity as to potentially engage Article 8?
- Is that interference in accordance with the law?
- Does that interference have legitimate aims?
- Is the interference proportionate in a democratic society to the legitimate aim to be achieved?

32. This is an appeal that turns upon the issue of the proportionality of the decision to remove. I note the guidance to be found upon the proper approach to a "private life" case in the decisions of Patel [2013] UKSC 72, and Nasim [2014] UKUT 25. I note the public interest in removal; the following passage in Nasim sets out the relevant principles;

> "14. Whilst the concept of a "family life" is generally speaking readily identifiable, the concept of a "private life" for the purposes of Article 8 is inherently less clear. At one end of the "continuum" stands the concept of moral and physical integrity or "physical and psychological integrity" (as categorised by the ECtHR in eg Pretty v United Kingdom (2002) 35 EHRR 1) as to which, in extreme instances, even the state's interest in removing foreign criminals might not constitute a proportionate response. However, as one moves down the continuum, one encounters aspects of private life which, even if engaging Article 8(1) (if not alone, then in combination with other factors) are so far removed from the "core" of Article 8 as to be readily defeasible by state interests, such as the importance of maintaining a credible and coherent system of immigration control.
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> 15. At this point on the continuum the essential elements of the private life relied upon will normally be transposable, in the sense of being capable of replication in their essential respects, following a person's return to their home country. Thus, in headnote 3 of MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 0037 we find that:-
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> > "3. When determining the issue of proportionality … it will always be important to evaluate the extent of the individual's social ties and relationships in the UK. However, a student here

> on a temporary basis has no expectation of a right to remain in order to further these ties and relationships if the criteria of the points-based system are not met. Also, the character of an individual's "private life" relied upon is ordinarily by its very nature of a type which can be formed elsewhere, albeit through different social ties, after the individual is removed from the UK."

16. As was stated in the earlier case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113:-

> "A person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements."

17. The difference between these types of "private life" case and a case founded on family life is instructive. As was noted in MM, the relationships involved in a family life are more likely to be unique, so as to be incapable of being replicated once an individual leaves the United Kingdom, leaving behind, for example, his or her spouse or minor child.

18. In R (on the application of the Countryside Alliance) v AG and others [2007] UKHL 52, Lord Bingham, having described the concept of private life in Article 8 as "elusive", said that:

> "… the purpose of the article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose" [10].

19. It is important to bear in mind that the "good reason", which the state must invoke is not a fixity. British citizens may enjoy friendships, employment and studies that are in all essential respects the same as those enjoyed by persons here who are subject to such controls. The fact that the government cannot arbitrarily interfere with a British citizen's enjoyment of those things, replicable though they may be, and that, in practice, interference is likely to be justified only by strong reasons, such as imprisonment for a criminal offence, cannot be used to restrict the government's ability to rely on the enforcement of immigration controls as a reason for interfering with friendships, employment and studies enjoyed by a person who is subject to immigration controls.

20. We therefore agree with Mr Jarvis that [57] of Patel and Others is a significant exhortation from the Supreme Court to re-focus attention on the nature and purpose of Article 8 and, in particular, to recognise its limited utility to an individual where one has moved along the continuum, from that Article's core area of operation towards what might be described as its fuzzy penumbra. The limitation arises, both from what will at that point normally be the tangential effect on the individual of the proposed interference and from the fact that, unless there are particular reasons to reduce the public interest of enforcing immigration controls, that interest will consequently prevail in striking the proportionality balance (even assuming that stage is reached).

> 21. In conclusion on this first general matter, we find that the nature of the right asserted by each of the appellants, based on their desire, as former students, to undertake a period of post-study work in the United Kingdom, lies at the outer reaches of cases requiring an affirmative answer to the second of the five "Razgar" questions and that, even if such an affirmative answer needs to be given, the issue of proportionality is to be resolved decisively in favour of the respondent, by reference to her functions as the guardian of the system of immigration controls, entrusted to her by Parliament."

33. To the extent that the Respondents rely upon their desire for the children to undertake their education in the UK at public expense, the following passage in Nasim is applicable;

> "25. A further seam running through the appellant's submissions was that, during their time in the United Kingdom, they had been law-abiding, had not relied on public funds and had contributed to the United Kingdom economy by paying their students' fees. Their aim was now to contribute to that economy by working.
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> 26. We do not consider that this set of submissions takes the appellants' cases anywhere. It cannot rationally be contended that their Article 8 rights have been made stronger merely because, during their time in this country, they have not sought public funds, have refrained from committing criminal offences and have paid the fees required in order to undertake their courses. Similarly, a desire to undertake paid employment in the United Kingdom is not, as such, a matter that can enhance a person's right to remain here in reliance on Article 8.
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> 27. The only significance of not having criminal convictions and not having relied on public funds is to preclude the respondent from pointing to any public interest in respect of the appellants' removal, over and above the basic importance of maintaining a firm and coherent system of immigration control. However, for reasons we have already enunciated, as a general matter that public interest factor is, in the circumstances of these cases, more than adequate to render removal proportionate."

34. To sum up then, the appeals do not rely upon the core concepts of moral and physical integrity. In my judgement the evidence relied upon does not establish that there are any compelling compassionate circumstances that mean the decision to remove the Respondents to Nigeria, leads to an unjustifiably harsh outcome.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 24 November 2014 did involve the making of an error of law in the decision to allow the appeal under the Immigration Rules and that decision is set aside and remade.

The appeals under the Immigration Rules are dismissed.

The appeals are dismissed on Article 8 grounds.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Respondents are granted anonymity. No report of these proceedings shall directly or indirectly identify any member of the family. This direction applies both to the Appellant and to the Respondents. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Upper Tribunal Judge JM Holmes
Dated 20 March 2015