



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00339/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Glasgow
on 21st April 2016**

**Determination Issued
On 26th April 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

**OCHUKO DAFIAGHOR-OLOMU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant present; no legal representative
For the Respondent: Mr M Matthews, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria born on 17th February 1974. She has not sought an anonymity order, and none has been made.
2. The appellant has a lengthy immigration history, set out in the papers provided by both parties and in the decision by First-tier Tribunal Judge Clough, promulgated on 8th September 2015, dismissing the appellant's appeal.

3. The appellant had been in the UK lawfully since 2003 and had been lawfully employed. Dismissal from her employment led to fairly protracted proceedings before an Employment Tribunal, resolved eventually in her favour, but after the decision leading to these proceedings was made. The Employment Tribunal had to resolve difficulties over the orders which might be made, having regard to the appellant's immigration status.
4. The application to the respondent which leads to the present proceedings was for leave to remain in the UK. It was not made under Tier 2 of the points-based system (the PBS), with which the appellant could not at the time comply. It was for leave to be granted outwith the terms of the Immigration Rules. Such applications are considered by the respondent on the basis of family and private life in the UK and under reference to the relevant paragraphs of the Immigration Rules. However, the essence of the appellant's application was that discretion should be exercised in her favour because of the unusual situation: the ongoing proceedings in the Employment Tribunal and her prospective reinstatement in her previous employment.
5. The respondent's decision on that application is dated 19th December 2014. It refers to the appellant's application as having been made on 27th December 2014, but that appears to be an error.
6. The respondent's decision says that on 3rd November 2014 the appellant had been asked to advise whether she still wished to be considered on an exceptional basis outside the Rules, or whether she wished to be considered within the Tier 2 route under which she had previously been granted leave. The decision says, "We requested your reply by 10th November 2014. To date, we have not received any reply from you".
7. The appellant continues to be considerably aggrieved by the fact that she was given short notice, under complex and longstanding circumstances, and by the fact that it is not correct to say that she did not reply. Rather, she says that she explained the current position and asked for further time.
8. The respondent's decision states that the application is refused under paragraph 322(9) of the Rules – that is to say, for failure to produce within a reasonable time information required by the Secretary of State to establish the claim to remain.
9. The decision goes on to consider the application by reference to the Immigration Rules, in particular private life under Article 8 of the ECHR; finds that the Rules are not met; and finds no exceptional circumstances consistent with the right to respect for private and family life contained in Article 8 of the ECHR which might warrant a grant of leave outside the Rules.
10. In her decision, Judge Clough found that the application was properly refused under paragraph 322(9) and went on to dismiss the appeal "under the Immigration Rules".

11. The appellant, who did not at this stage have legal advice (although it seems from the file she did have advice earlier in the proceedings), appeals to the Upper Tribunal on what are frankly extensive and confused grounds. She seeks to raise a number of points about her immigration history, including her communications with the respondent since the decision under appeal was made, which are irrelevant to these proceedings. She refers, for example, to the respondent's "evidential flexibility policy", which operates under precisely defined circumstances which have nothing to do with the present case.
12. The appellant thinks it significant that the respondent may have erred in saying that she had not replied by the date the decision was made. Unfortunately for her, however, and as correctly pointed out by Mr Matthews, that makes no difference to the outcome. What was before the respondent was an application for leave to remain outwith the requirements of the Immigration Rules. The appellant had no case for leave to remain under reference to the family and private life provisions of the Immigration Rules, or based on similar considerations going beyond the Rules. She asked the respondent to exercise discretion in her favour and to depart from the Immigration Rules based on the very specific circumstances of her case.
13. Whether or not that was a reasonable request, and even if the respondent made a mistake about whether she replied, there was no ground on which the First-tier Tribunal could possibly have allowed her appeal.
14. Section 86(3)(b) of the 2002 Act permitted the Tribunal to allow an appeal insofar as it thought that "*a discretion exercised in making a decision against which the appeal is brought ... should have been exercised differently*". However, by section 86(6) "*refusal to depart from or to authorise departure from Immigration Rules is not the exercise of discretion for the purposes of sub-section (3)(b)*".
15. The effect of that provision was that the First-tier Tribunal could not have allowed the appellant's appeal, on any view of the facts. Whether to exercise discretion to grant leave was up to the respondent only. It had nothing to do with the tribunal.
16. The Upper Tribunal may interfere with the decision made by the First-tier Tribunal only if it has made a material error of law. In respect of the Immigration Rules, it is not possible to find an error in the First-tier Tribunal's decision in this case which is material because there could have been no outcome in favour of the appellant.
17. The one point which might go in the appellant's favour is not to be derived from her Grounds of Appeal, but was helpfully and fairly pointed out by the Presenting Officer. The First-tier Tribunal dismissed the appeal under the Immigration Rules. It did not explicitly make a decision based on the grounds procedurally available to the appellant that her removal as a consequence of the decision might be incompatible with her rights under

the ECHR. Taking a generous view, that was not simply a procedural but a material omission.

18. It is not possible to vary an application for leave to remain during the period while leave is extended pending an appeal. However, were it to be found that the First-tier Tribunal failed to deal with the appellant's position under Article 8 of the ECHR, that would lead to a period of time during which she might (possibly upon advice) consider withdrawing her appeal. She would then have 28 days to make a fresh application under Tier 2, if she is in a position to support such an application.
19. The appellant was not content with that possible outcome. She insisted that given the whole history of her case the Upper Tribunal should grant her indefinite leave to remain in the UK, which she said she would by now have achieved had it not been for the interruptions caused by her unfair dismissal (later remedied) and the shortcomings of the respondent. She would not be satisfied with anything less.
20. I reserved my decision.
21. I have some sympathy with the position in which the appellant has found herself, and no doubt it has caused her anxiety over the last few years. However, the Upper Tribunal does not have a broad overriding jurisdiction to grant the remedy she would like to have.
22. The FtT and the UT have only the powers which Parliament gives them by statute. The FtT is limited to allowing or dismissing the appeal which is before it. The UT is governed by the requirement to find a material error of law in the FtT decision.
23. The statutory appeal process is not, as the appellant seems to imagine, an ongoing negotiation between her and the respondent, supervised by the tribunals, based on her evolving circumstances. There is no legal route by which the outcome the appellant sought might be achieved.
24. There is no material error in the First-tier Tribunal's determination insofar as it dismissed the appeal under the Immigration Rules. Even if there was any slip in respect of the appellant's reply and paragraph 322(9), there was no application before the respondent which might have succeeded within the terms of the Immigration Rules.
25. Discretionary leave was for the respondent to decide, not the tribunal, so her appeal was not capable of being allowed on that basis.
26. Perhaps stretching a point in the appellant's favour, I find that there is error in the decision of the First-tier Tribunal to the extent that it failed to deal with the human rights grounds before it, and that the case should be remitted to the First-tier Tribunal for that matter to be remedied.
27. The appellant should not take this decision as any indication that the outcome on human rights grounds in the FtT at any future hearing is likely to be in her favour, if she allows matters to go that far.

28. The appellant will have the opportunity to take the steps which have been hinted at above, but that is a matter entirely for her. Nothing in this decision (and nothing said by the Presenting Officer, as he properly made clear) should be taken as an indication that any application made in the future to the respondent will succeed. The appellant is further reminded that it is not for the respondent, the First-tier Tribunal or the Upper Tribunal to advise her on how to proceed, or to grant her overriding remedies to make up for any perceived past misfortune. If she does make any further application to the respondent, she may expect only that it will be decided according to its own merits, within the terms of the Immigration Rules.
29. The decision of the First-tier Tribunal erred in law, because it **omitted to deal with human rights grounds. To that extent only, it is set aside.** The decision under the Immigration Rules is to stand.
30. In order for the decision to be remade, taking account of human rights grounds, the case is **remitted to the First-tier Tribunal.** It may be decided by any member of that Tribunal. (There is no reason to exclude Judge Clough.)

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

22 April 2016
Upper Tribunal Judge Macleman