Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/01892/2014
IA/14525/2014
IA/03589/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2016	**On 20 May 2016**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

MARYANN ABEHKE
MARY-ANNE ABEKHE
ZANETA ABEKHE

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellants: Mr S Karim, instructed by A & A Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are nationals of Nigeria, mother, adult daughter and minor daughter. They appealed to the First-tier Tribunal against decisions of the respondent refusing them leave to remain. Judge Bruce dismissed their appeals. They now appeal, with permission, to this Tribunal. Although they are members of one family, the issues raised are not identical, because the second appellant is not dependent upon her mother, whereas the third is. Like the First-tier Tribunal Judge, we shall deal with the second appellant first; we shall then return to her position at the end of this determination.

2. The second appellant came to the United Kingdom in August 2006; she was then aged 16. She had leave to enter as a visitor. She was brought by her family and left in the care of a paternal uncle. Her leave expired and was not renewed. She appears, however, to have attended a course at the University of Sheffield, graduating in 2011. In December of that of year she applied for indefinite leave to remain on human rights grounds. The application was refused, but limited leave to remain was granted until 9 November 2013, apparently simply on the grounds that she had family here. On 1 October 2013 she applied for further leave to remain on human rights grounds. That application was refused and on 9

March 2014 she was served with notice of that decision and of a decision to remove her.

3. On appeal against that decision to the First-tier Tribunal, Judge Bruce heard oral evidence from her, and regarded her as credible. The judge accepted that she was not responsible for the arrangements made for her arrival in the United Kingdom or for her overstaying. Judge Bruce found that she did not meet the requirements of the rules, and that although her removal from the United Kingdom would amount to an interference with her private and family life, the interference would not be disproportionate. Thus she dismissed the second appellant's appeal.

4. The first appellant came to the United Kingdom in October 2009 with leave to enter as a Tier 4 (General) Student Migrant. The leave was subsequently varied to leave under the Tier 1 (Post-study Work) Category. The first appellant's evidence was that during that period she was looking for a new course, with a view to undertaking a Ph.D. She had not, however, identified any course or obtained a CAS in time to make a new application before her leave expired on 9 November 2013. On 7 November 2013 she made an application for further leave as a "prospective student visitor", saying that she wanted some additional time in order to find a course and get a CAS. Her application was refused on the mandatory ground that the application was for a purpose not covered by the Immigration Rules. That decision, and the decision to give directions for her removal, was notified on 21 December 2013. The notice of decision included a notice under s. 120 of the Nationality, Immigration and Asylum Act 2002, requiring the applicant to give any reasons why she thought she should be allowed to stay in the country, despite the present decision.

5. On 29 December 2013 she raised human rights arguments based on the continuity of the third appellant's education and private life in this country, and on the basis that the first appellant needed further time in the United Kingdom in order to settle the second appellant down here.

6. The appeals were listed for hearing on 1 August 2014. By then, the first appellant had obtained a CAS from Heriot Watt University, offering her a place to undertake an MSC. Judge Howard, before whom the matter was listed, was asked to allow the appeal on the basis that the first appellant now had a further reason for being allowed to stay in the United Kingdom, which was said to be that she met the requirements for a grant of leave as a student. It was pointed out that she had made no application for leave to remain as a student, but in response it was argued on her behalf that she could make no application whilst her existing leave under s. 3C of the Immigration Act 1971, continuing during the appeal, remained current. If she withdrew the appeal she would have no leave, and the CAS would automatically become invalid. This argument caused Judge Howard to decide that he could not determine the appeal. He adjourned it, with directions requiring the first appellant to service on the respondent "all prescribed material she relies on to establish properly made application as Tier 4 (General) Student within 4 weeks". By the time the matter came before Judge Bruce, she was able to be satisfied that the materials submitted to the Secretary of State included a valid CAS and appropriate evidence of financial standing. But, despite the reference to a "properly made application" in the directions, the applicant had not completed an application form or submitted a fee. It appears that the Home Office had specifically indicated to the first appellant that if she wanted leave as a Tier 4 Migrant she had to make an application on that basis, by filling in the form and paying the fee.

7. At the date of the hearing before Judge Bruce, the CAS had expired, but the appellant had been able to obtain a new one. The argument before Judge Bruce was that the first appellant is a genuine student who is in funds, but cannot make a Tier 4 application whilst the appeal is outstanding, whereas if she

withdraws it her CAS will lapse. The remedy of departure to Nigeria to make a new application was unduly harsh because of the impact on the third appellant's education.

8. The third appellant is now aged 15. She is at school. She has had leave in line with that granted to her mother, and the present application accompanied her mother's. It was refused on the ground that her mother's leave had been refused and she too was given notice of that decision, and a decision to remove her, on 21 December 2013. Although her position as a minor currently in education in the United Kingdom has clear and independent relevance to the outcome of the appeal, it is convenient to look at her appeal with her mother's as Judge Bruce did.

9. Judge Bruce heard oral evidence from the first appellant, whom she regarded as credible. She noted the difficulty arising out of s. 3C of the 1971 Act, but observed as follows:

> "She must take some responsibility for the fact that she did not manage to identify a course and obtain a CAS before her Tier 1 (PSW) leave expired in November 2013. Plainly speaking, had she got her act together she would not now be in this predicament."

10. Judge Bruce considered the issues raised by the s. 120 Notice and the subsequent assertion that the first appellant was entitled to remain in the United Kingdom as a student. She decided that that was not so. The applicant did not meet the requirements imposed by the rules for leave to remain as a student, because she had not completed an application form and paid the fee. No other provisions of the Immigration Rules were relied upon; and Judge Bruce went on to consider the matter outside the rules, taking into account the position of both the first and the third appellants, their history and circumstances, and the provisions of s. 117B of the 2002 Act. She noted that there were very many positive features in their case, but the essence of her conclusion is as follows:

> "In weighing proportionality I must also consider the extent of the interference. That is the rub. Mr Yerukum [for the appellants] submits that failure in this appeal will result in the life that these appellants have established in the UK being irreparably disrupted. That is simply not so. There is an option available that would limit the interference considerably. That is that the appellants return to Nigeria for a short period in order to make an application for entry clearance. If for instance this was done at the beginning of Zaneta's summer holidays she could be back in time to start the new school year."

11. She thus dismissed the appeals.

12. The grounds supporting the application for permission to appeal to this Tribunal are combined grounds relating to all three appellants. They assert that the First-tier Tribunal erred in concluding that a formal application had to be made. When there is a response to a Section 120 Notice, the Tribunal acts as the primary decision-maker (AS (Afghanistan) v SSHD [2009] EWCA Civ 1076), and there is no particular form for a statement under s. 120 (Jaff v SSHD [2012] UKUT 396 (IAC)). Secondly, Judge Bruce's decision that a form, and an application fee, were required, ignored the fact that whilst leave continues under s. 3C, no application could be made. Thirdly, in assessing the matter under article 8 the judge should have taken into account that the first appellant met the substantive requirements for leave to remain as a student, even if the form had not been completed and the fee had not been paid. The final substantive paragraph of the grounds is as follows:

> "As such the second appellant's appeal would be materially altered if the first and third appellant's appeals were allowed under the rules or article 8. Therefore if the FtT [sic] considers that there is a

material error as highlighted above, there must be a reconsideration of the second appellant's appeal as well."

13. Permission to appeal was granted by Judge Ransley of the First-tier Tribunal on the following grounds:

> "It is arguable that the Judge may have erred in concluding that A1's appeal under the Tier 4 Student Rules could not be allowed on the basis that A1 had not submitted a formal application to the respondent in accordance with para A34 of the Immigration Rules rather than simply adducing the evidence in response to the Section 120 Notice.
>
> It is arguable that the Judge's Article 8 assessment was flawed due to failure to take into account that the respondent's decision cannot be said to be in accordance with the law when A1 satisfied the Tier 4 Rules but had not made a formal application."

14. The arguments raised before us were the same as those that had been raised previously. The applicant met the requirements of the Immigration Rules with the exception of the requirements to make a formal application and pay a fee, and so was entitled to leave as a student. That argument we regard as without merit. There is no freestanding entitlement to grant of leave in a particular category on the basis of meeting some, but not all, of the requirements of the Rules. Where no particular form or fee is required (for example in an asylum claim) the s. 120 procedure enables the Tribunal to foster a one-stop culture by determining the issues raised in the Notice. Further, as para GEN.1.9 of Appendix FM to the Immigration Rules provides, there are circumstances in which when matters are raised on an appeal an application form is not required. That is a specific provision of the Rules, which does not apply in the case of student applications. There is simply no basis for saying that a person can meet the requirements of the student rules, and be entitled to leave as a student, simply on the basis of meeting the requirements provided specifically for students, without meeting the general requirements for applications. To decide that a person was entitled to leave in a particular category merely by providing themselves with the documentation which would have established an entitlement to leave if an application had been made, without actually making the application, would lead to obvious and immediate chaos.

15. In deciding whether, in the context of the s. 3C leave, the requirement to make an application was disproportionate in the case of the first and third appellants, the judge clearly took into account all relevant factors. She noted that the situation the first appellant was in was of her own making. We would add that the application made by the first appellant was one which was bound to fail, and so cannot readily carry any credit for having been made, other than the formal consequence of the extension of leave. The position was that the first appellant had allowed her existing leave to run almost to its end without making the arrangements that she needed to make if she wanted it to be continued on any proper basis. The judge took into account all the factual matters that were argued, and, as is perfectly clear from her determination, looked at the question of interference from the point of view of what was realistically practicable, not from the point of view of the worst case scenario argued by the appellant's representative. We cannot see that her determination discloses any error of law as argued in the grounds.

16. We have indicated what the grounds of appeal are in relation to the second appellant. It seems to us that they do not advance the second appellant's case at all. She is not dependant upon her mother. Her case was properly dealt with and determined by Judge Bruce. There is no proper ground for interfering with her decision.

17. For the foregoing reasons all three appeals are dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 9 May 2016