



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/23963/2014

THE IMMIGRATION ACTS

Heard at Manchester

Decision & Reasons

On 6 October 2015

Promulgated

On 20 January 2016

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

FUNMILAYO JOY OSHIBAJO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not present or represented

For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant Funmilayo Joy Oshibajo, was born on 2 February 1982 and is a female citizen of Nigeria. She appealed to the First-tier Tribunal (Judge Birrell) against the decision of the respondent dated 16 May 2014 to refuse her application for further leave to remain in the United Kingdom as the dependant of a points-based migrant. She also appeals against the decision to remove her under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal, in a decision promulgated on 14 November 2014, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Both parties agreed that the appellant was obliged to meet the requirements of paragraph 319 of HC 395 (as amended):

319C. Requirements for entry clearance or leave to remain

- (i) Where the relevant Points Based System Migrant is applying for, or has been granted, entry clearance, leave to enter, or leave to remain in the United Kingdom as a Tier 4 (General) Student either:
 - (i) the relevant Points Based System Migrant must be a government sponsored student who is applying for, or who has been granted, entry clearance or leave to remain to undertake a course of study longer than six months;
 - (ii) the relevant Points Based System Migrant must:
 - (1) be applying for, or have been granted entry clearance or leave to remain in order to undertake a course of study at post-graduate level that is 12 months or longer in duration; and
 - (2) be sponsored by a sponsor who is a Recognised Body or a body in receipt of funding as a higher education institution from either:
 - (a) the Department for Employment and Learning in Northern Ireland;
 - (b) the Higher Education Funding Council for England;
 - (c) the Higher Education Funding Council for Wales; or
 - (d) the Scottish Funding Council;
 - (iii) the relevant Points Based System Migrant must be applying for, or have been granted leave to remain as a Tier 4 (General) Student on the doctorate extension scheme; or
 - (iv) the following conditions must be met:
 - (1) the relevant Points Based System Migrant must be applying for entry clearance, leave to enter, or leave to remain, to undertake a course of study that is longer than six months and either:
 - (a) have entry clearance, leave to enter, or leave to remain as a Tier 4 (General) Student or as a student to undertake a course of study longer than six months; or
 - (b) have last had entry clearance, leave to enter, or leave to remain within the three months preceding the application as a Tier 4 (General) Student or as a student to undertake a course of study longer than six months; and

(2) the Partner must either:

- (a) have entry clearance, leave to enter, or leave to remain as the Partner of a Tier 4 (General) Student or a student with entry clearance, leave to enter, or leave to remain, to undertake a course of study longer than six months; or
- (b) have last had entry clearance, leave to enter, or leave to remain within the three months preceding the application as the Partner of a Tier 4 (General) Student or as a student to undertake a course of study longer than six months; and

(3) the relevant Points Based System Migrant and the Partner must be applying at the same time.”

3. The judge noted that, in May 2013:

the appellant and her partner made a joint application as Tier 4 Student and dependant as the appellant’s partner Olatunji Busari had been accepted onto a PhD programme at the London School of Commerce (an Associate College of Cardiff Metropolitan University) starting on 17 June 2013 lasting until 30 June 2016.

The judge went on to record at [23]:

the particular provisions in issue are complex and not clearly worded in my view but I am satisfied that there is more than one way to satisfy 319C(i) because the word **either** appears at the end of 319C(i). It can either meet it [sic] by satisfying the provisions from 319C(i)–(iii) or alternatively meeting 319C(iv) onwards.

4. The judge rejected Counsel’s argument that the appellant either had to show that he was a government-sponsored student or had been granted leave for a course of study for six months or more; that was not how the judge “read the provisions”. The judge found the appellant could not succeed under the route set out in 319C(i)–(iii). As regards sub-section (iv) the appellant did not claim to be involved in the Doctorate Extension Scheme referred to in sub-section (iii). Furthermore, the judge was:

not satisfied that the appellant meets the requirements of (iv)(1)(a) or (b) but would require the appellant’s partner to already have leave as a Tier 4 Student (1)(a) or have had leave as a Tier 4 Student within three months prior to the date of application (1)(b).

5. Referring to paragraph 319C, the appellant, in the grounds of appeal to the Upper Tribunal, asserts that the judge erred by failing to consider whether the appellant met the requirements of either 319C(i) or (ii) or (iii) or (v) in isolation; the grounds assert that paragraphs (i), (ii) and (iii) are not to be read conjunctively. As a consequence, the requirement for an applicant to be a “government-sponsored student” is only relevant to an assessment under paragraph (i) which can and should be read independently from the other provisions. The appellant asserts that she

was able to satisfy the requirements of the Immigration Rules by meeting the requirement of paragraph 319C(iii) alone.

6. The use of the word “either” at the end of the initial paragraph (i) of paragraph 319C certainly gives rise to the possible construction of the remaining sub-paragraphs of the Rule as being read disjunctively; the use of the word “either” anticipates the subsequent appearance of the word “or”. There is, however, neither “or” nor “and” at the end of subparagraph (i). The difficulty for the appellant, however, lies in the fact that subparagraph (ii) provides that a points-based system migrant has been granted entry clearance to undertake a postgraduate level course of study of more than twelve months’ duration (which she had) but also that she be sponsored by a Recognised Body or a body in receipt of funding as a higher education institution; the appellant failed to meet this requirement because she was privately funded. Further, it is not clear why the appellant should qualify under subparagraph (iii) (as the grounds of appeal contend) when there was no evidence that the appellant was on a doctoral extension scheme (as Judge Birrell noted at [25]). In addition, I see no error in the judge’s assessment that the appellant could not meet the requirements of sub-paragraph (iv) (see [26] above). In the circumstances, Judge Birrell did not err in law by dismissing this appeal under the Immigration Rules.
7. The grounds of appeal also complain that the judge has produced an unsafe assessment of Article 8 ECHR. At [28], the judge recorded that “Mr Brown [Counsel for the appellant at the First-tier Tribunal hearing] did not address Article 8 in his submissions”. The appellant asserts that the judge had indicated to Mr Brown no submissions on Article 8 were required.
8. If the judge had not considered Article 8 (which had been pleaded in the grounds of appeal to the First-tier Tribunal) then she may, if the assertion made in the grounds of appeal is accurate, fallen into legal error. However, whatever may have been the reason for there having been no oral submissions as regards Article 8, the judge proceeded in her decision to carry out a thorough analysis of the relevant evidence and to apply the law as regards Article 8 accordingly. The judge observed [39] that “the decision to remove the appellant does not have to break up this family as clearly they have the option of returning to Nigeria together to pursue their family and private life”. The judge had proper regard to the best interests of the appellant’s children [38] and noted that there was “never a guarantee that the appellant and her family would be permitted to remain in the United Kingdom because they were dependants of a student ...” The Article 8 analysis is thorough and legally sound. If the matters raised in the grounds of appeal are an indication of the submissions which Mr Brown chose not to make at the First-tier Tribunal hearing, then I find that that failure has made no difference whatever to the outcome of the appeal on Article 8 grounds.
9. In the circumstances, this appeal is dismissed.

Notice of Decision

This appeal is dismissed.

No anonymity direction is made.

Signed

Date 10 January 2016

Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 10 January 2016

Upper Tribunal Judge Clive Lane