



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27043/2011

THE IMMIGRATION ACTS

Heard at Field House
On August 10, 2018

Decision & Reasons Promulgated
On August 28, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MISS TEMITOPE OMOLARA AJIGA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Olawanle, Legal Representative
For the Respondent: Ms Kiss, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity order in this appeal.
2. The appellant entered the United Kingdom on September 19, 2005 and was given leave to remain in this country until May 30, 2007. Her leave was subsequently extended until July 31, 2011. On July 31, 2011 the appellant lodged an application to remain under the Immigration Rules as a Tier 4 (General) Migrant. The respondent refused this application on September 7, 2011 on the grounds she did not satisfy the Immigration rules. In particular, the application was refused because the appellant failed to demonstrate sufficient maintenance funds in accordance with the Immigration Rules.

3. The appellant appealed that decision and that appeal was eventually listed before Judge of the First-tier Tribunal Stanford on October 21, 2011 and in a decision promulgated on November 9, 2011 that Judge dismissed the appeal under the Immigration Rules but allowed the appeal under article 8 ECHR.
4. Permission to appeal was sought by the respondent and on November 24, 2011 Designated Immigration Judge Digney granted the respondent permission to appeal as he found it arguable the Judge had not explained why an appeal that just failed under the Immigration Rules could succeed under article 8 ECHR.
5. It seems that permission to appeal had been granted over six years ago but the Tribunal marked its records as if the appeal had been refused. In May 2016 the respondent contacted the Tribunal and after a considerable period of time a file was reconstituted and a notice of hearing was sent out.
6. The Judge had allowed the appeal under article 8 and he allowed the appeal on the basis that the appellant should be allowed to continue her education and possibly career. The Supreme Court made clear in Patel and others v Secretary of State for the Home Department [2013] UKSC 72 that allowing appeals on this basis is erroneous and I found there was an error in law.
7. Having found an error in law the representatives agreed that this case should remain in the Upper Tribunal and I agreed to list the matter for a substantive hearing on August 10, 2018 and directed that the appellant's representatives file supporting evidence including an up-to-date witness statements and skeleton argument addressing all issues including the issue of whether Section 3C applied and whether the appellant could succeed under the "long residence rule".
8. At the resumed hearing, Mr Olawanle accepted that the appellant had not made an application under paragraph 276B HC 395 but even if such an application was permitted today there were two central problems facing such an application.
9. Firstly, the respondent as primary decision maker was entitled to consider the application and secondly, paragraph 322(1C)(iii) HC 395 states that an application for indefinite leave to remain is to be refused where the applicant has been convicted of an offence and received a custodial sentence. The appellant would be unable to make an application for long residence until a period of seven years has passed (from the end of her sentence).
10. Mr Olawanle accepted that Section S-LTR 3.1 of Appendix FM of the Immigration Rules also applied when considering private life under paragraph 276ADE HC 395 and consequently the appellant could not succeed under the Immigration Rules.
11. Ms Kiss accepted that the appellant had remained here lawfully as she had Section 3C leave.
12. The issue for the Tribunal was whether there was private or family life and if there was whether it would be proportionate to require the appellant to leave the United Kingdom.

FURTHER EVIDENCE

13. I admitted into evidence the bundle of documents submitted in advance of the hearing and I also took oral evidence from both the appellant and her brother, O.
14. The appellant adopted a witness statement dated July 1, 2018 and confirmed that since the hearing in 2011 she had continued to live in the United Kingdom and had worked as a care assistant in the NHS until January 2016 when she lost her job due to a lack of documentation concerning her ability to work. She had always worked when she was lawfully allowed to. He had also carried out voluntary work within the church and had taught maths and science.
15. She had money in her HSBC bank account and the conviction contrary to section 4 of the Identity Documents Act 2010 related to her attempting to access her own bank account using a false Dutch passport. She admitted that she had received an eight-month sentence and had been released on or around July 23, 2016.
16. She stated that she continued to live independently albeit keeping in contact with her brother and his family until March 2018 when she moved into her brother's home.
17. During cross-examination she confirmed that she had paid someone £400 for the false passport and she been given this person's details by somebody else. She would take her niece and nephew to school and go to the park with them. She was supported by her brother.
18. With regard to family in Nigeria she stated that only her mother now lived there and that she was supported by her brother. Her brother had also funded her studies here albeit she had not been able to complete her studies due to the problem with her visa. While she has some qualifications, she did not believe they would enable her to obtain employment in Nigeria.
19. When challenged about what steps she had taken since the November 2011 to obtain her visa she stated that she had called the Home Office and had been told it was pending. She had never written herself to the Home Office and her last contact had been in 2015.
20. Her brother adopted his witness statement dated July 1, 2018 and gave oral evidence. He confirmed that he had been unaware of her legal problem with the police until she had been arrested. She had brought the family into disrepute and he was very disappointed with her.
21. He confirmed that although she had lived independently for the majority of time that she had been in this country she had been a regular attendee at his home although the appellant had visited his house less often after she had been released from prison in July 2016 because she was depressed.
22. He confirmed he had savings of around £48,000 but that he intended to use these monies to purchase a property. He had two children, both of whom attended school, and he lived at home with his children and his partner. Whilst he was in

employment and he had savings he would be unable to give any of that money to his sister or support her in Nigeria. He believed it would be very difficult for her to survive in Nigeria as she would be unable to obtain work.

23. Both the appellant and her brother stressed her work within the church and both urged the Tribunal to allow her appeal on private/family life grounds.

SUBMISSIONS

24. Ms Kiss submitted that the appellant could not demonstrate family life for the purposes of Appendix FM of the Immigration Rules and there were no “very significant obstacles” to her returning to Nigeria.
25. She reminded the Tribunal that section S-LTR 3.1 of Appendix FM of the Immigration Rules applied and this meant the appellant was unable to succeed under paragraph 276ADE HC 395.
26. Ms Kiss submitted that the appellant had achieved some qualifications both here and in Nigeria and had demonstrated an ability to maintain employment as a care assistant for a number of years. She had spent 29 years living in Nigeria and whilst she had been living here for almost 13 years she had still spent the majority of her life in Nigeria. When she arrived in this country her leave was always precarious and she never had an expectation that she would be allowed to stay. Section 117B of the 2002 Act applied in this case.
27. There had been a delay between 2011 and 2016 and whilst part of that delay lay on the respondent in not chasing up the application to appeal nevertheless there was a responsibility upon the appellant to chase up the matter bearing in mind she needed the visa to stay here lawfully.
28. Whilst her leave had always been lawful she had been fully aware that any leave was temporary until such time as the Tribunal granted her indefinite leave to remain. It was not until April 2016 that she instructed solicitors to write about her status and that coincided with her having been arrested for the criminal offence detailed above.
29. There was no evidence the appellant had any physical or health problems and both she and her brother confirmed their mother still lived in Nigeria. The appellant’s brother had substantial sums available if he wished to use them to support his sister in Nigeria and she invited the Tribunal to reject any suggestion that he could not support her because the evidence was that not only was he supporting her now but that he had previously supported both her and their mother. There was a voluntary return scheme available which would financially benefit the appellant if she chose to use it.
30. The appellant had not lived with her brother for the majority of the time she had been here. According to the oral evidence she had only moved in to live with her brother in either March or May of this year and with the exception of a two-year period when she first arrived she always lived apart from her brother.

31. Both she and her brother were adults and she submitted that there was no family life for the purposes of article 8 ECHR. Whilst she had a relationship with her niece and nephew there was no suggestion that this went beyond anything more than a relationship of being an aunt to them.
32. Although she had evidenced the fact that she had been working in the church this in itself would not engage article 8 for private life and whilst the delay was regrettable part of the blame still fell with her as she had failed to resolve her immigration status despite knowing she did not have relevant documents to remain and work in.
33. Mr Olawanle invited the Tribunal to have regard to his skeleton argument and to allow her appeal on article 8 grounds. He pointed out the appellant had been here lawfully since 2005 when she entered as a student and that she had remained here lawfully to this present day. He submitted that she had no real qualifications to take back to Nigeria-a country where she had been unable to obtain work previously. She had however demonstrated that she had worked as a care assistant within the NHS and he submitted that it would be disproportionate to require her to return. He submitted there had been a substantial delay and this should be a factor the Tribunal should take into account.
34. With regard to her criminal offence he submitted she was not a persistent offender had only used the document to try and access her own bank account. She had lived here for almost 13 years and spoke English and had demonstrated an ability to hold down employment.
35. The appellant also had family life with her brother and his children and removal would breach her rights under article 8 ECHR.

FINDINGS

36. The appellant entered this country in 2005 as a student and it appears common ground that firstly, she has remained here lawfully during this period and secondly, her immigration status was precarious. It is further accepted that there has been a delay of over six years between the date her appeal was originally determined and today's resumed hearing.
37. On the previous occasion this matter was before me, I made it clear that this delay had been occasioned by the failure by the respondent to follow up his appeal, the failing of the Tribunal in erroneously recording the fact permission had been refused and the failure by the appellant to do very little about the matter until she had been arrested in April 2016.
38. I had adjourned the error of law hearing until today's date to identify what had happened in the appellant's life since 2011 and the bundle of documents revealed that she had been working within the NHS between July 2006 and January 2016 on an ad hoc contract which meant she worked when she was required. That employment ceased because she had been unable to provide evidence of her ability to work.

39. A few months later she committed the offence for which she was remanded into custody and ultimately sentenced to 8 months prison. I have not been provided with either a case summary or anything else relating to that conviction so I accept, based on the appellant's evidence, that she used a false Dutch passport to access her own bank account. How much was in that bank account or why she needed such a document is not totally clear as no evidence was adduced although I am told she continues to use the same account.
40. Having served a custodial sentence, she was released in July 2016 and it appears she returned to live at her former accommodation because she only became homeless, according to her evidence, in March 2018 albeit her brother stated it was May 2018.
41. The only family she has in this country is her brother and his children. I accept that she has built up a relationship with them although I find that in so far as her relationship with her brother is concerned this does not engage article 8 family life.
42. I have had regard to the decisions of Ghising [2012] UKUT 00160, Kugathas [2003] EWCA Civ 31 and Kugathas [2003] EWCA Civ 31. I am not satisfied that the relationship between her and her brother goes beyond normal emotional ties.
43. The only other family life she has put forward is that with her niece and nephew but they have their parents with whom they live and I note that she only moved into their home recently and she only did that because she had nowhere else to live.
44. The real issue in this case is whether the appellant has created a private life strong enough to engage article 8 ECHR. If she has then I have to consider whether removing her would be disproportionate.
45. She cannot meet the requirements of the Immigration Rules because of her conviction but even if paragraph 276ADE(1)(i) HC 395 had not applied I am not satisfied there are "very significant obstacles" which would prevent her reintegration into Nigeria.
46. Her claim was that she had no employment when she lived in Nigeria and at the time the only direct family living there was her mother. Today that position remains the same in the sense that her mother is alive and still living in Nigeria.
47. She has demonstrated an ability to obtain work as a care assistant and whilst that particular skill may not directly assist her in Nigeria it does demonstrate her ability to work and some of the skills she has obtained through her studies and employment will be usable in Nigeria.
48. Her brother supports her in this country by providing her with accommodation and no doubt general maintenance. He also supported her during her studies and continues to provide support for their mother. He has demonstrated an ability to not only support his family but also to save around £48,000 as evidenced by his bank statements.

49. To suggest that his support would end if she were returned to Nigeria lacks credibility as that would go against everything he has done for her for at least the last 13 years.
50. I take into account the factors set out in section 117B of the 2002 Act. The appellant speaks English and has demonstrated that she would be able to obtain employment and support herself, if allowed. Currently she is financially supported by third-party and is therefore not financially independent. Whilst she has been here lawfully her immigration status has been precarious and section 117B of the 2002 Act makes clear that *little* weight should be attached to a private life formed whilst here precariously.
51. The attraction of living in the United Kingdom clearly outweighs the attraction of being returned to Nigeria.
52. I have taken into account there has been a substantial delay. Whilst I was asked to accept no blame should attach to the appellant I do not accept that submission. The appellant knew in 2011 she needed a visa to remain in this country, but she took few steps to resolve this issue until April 2016 which was when she was arrested.
53. She may have called the Home Office but such calls were few and far between and by her own admission she had done nothing, personally, since 2015.
54. She knew in 2012 she had a problem because she lost her employment over it. Accordingly, whilst I accept part of the delay falls upon the failings of the respondent she herself is not blameless.
55. Her mother continues to live in Nigeria which is a country the appellant has spent the majority of her life living in. I am satisfied that if the appellant was removed there would be continued support for the appellant by her brother.
56. I have also considered her role within the church but this particular skill is transferable to where ever she lives. The reference from the Pastor at page 55 of the appellant's bundle makes no reference to her criminal conviction and I am not convinced they were made aware of it although I make it clear that conviction should not have prevented her from working in the church.
57. Taking all of the above factors into account I find that whilst the appellant has demonstrated a private life in this country it would not be disproportionate to remove her.

DECISION

58. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
59. I have remade the article 8 ECHR decision and I dismiss the appellant's appeal.

Signed

Date August 10, 2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award because I have dismissed the appeal.

Signed

Date August 10, 2018



Deputy Upper Tribunal Judge Alis