Neutral Citation Number: [2018] EWCA Civ 3003

Case No: C2/2016/1532

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
JR/14036/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2018

Before:

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE HADDON-CAVE

- -

Between:

BA (NIGERIA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

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Mr M Aslam (instructed by **Linkworths Solicitors**) for the **Applicant**
Mr N Chapman (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 1st November 2018

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Approved Judgment

Lord Justice Moylan:

Introduction

1. The appellant, Mr Agumba, appeals from the decision of Jay J, sitting in the Upper Tribunal (Immigration and Asylum Chamber) on 3 March 2016, by which he refused the appellant permission to apply for judicial review of the Secretary of State's decision of 5 August 2016. By that decision the Secretary of State refused the appellant's application for indefinite leave to remain and certified his claim as being clearly unfounded.

2. At this hearing the appellant has been represented by Mr Aslam and the respondent by Mr Chapman.

Background

3. The appellant is a Nigerian national, now aged 34. He entered the United Kingdom on 29 September 2004, when he was aged 20, on a student visa valid for just over one year. He was granted further periods of leave to remain as a student until December 2010. He was then granted leave to remain as a Tier 1 (Post-Study) worker until 13 December 2012. His application for leave to remain as a Tier 1 entrepreneur was refused on 9 May 2013. His appeal rights were exhausted on 17 March 2014. The appellant has been an overstayer since then.

4. A subsequent application by him for leave to remain as a Tier 1 entrepreneur was refused on 1 May 2014. The appellant was refused permission to apply for judicial review of that determination on 13 November 2014. On 30 December 2014 the appellant applied for indefinite leave to remain, initially solely on the basis of long residence, namely 10 years, under paragraph 276B of the Immigration Rules. On 9 March 2015 further grounds were advanced on the appellant's behalf by his solicitors, namely his private and family life within the Rules and under Article 8 more generally, outside the Rules.

5. A number of matters were relied upon. In summary they were as follows: that the appellant had left Nigeria when he was a young man and had no continuing ties with that country, in part because he had been rejected by his family there; that he had spent his "formative years" in the United Kingdom, which was very much his home; that it was in the United Kingdom that he had "developed as an individual and formed bonds, both socially and culturally"; he had been a conscientious student and had achieved a great deal while in the United Kingdom; that he had been in a "serious long-term relationship" with a British national since 2012: they were engaged and intended to marry as soon as possible. It was also argued that the appellant's was an exceptional case and that removing him from the United Kingdom would breach his Article 8 rights due to the length of time he had been living here and the significant integration he had made into the community here.

6. The Secretary of State's decision letter is dated 5 August 2015. The claim, based on 10 years' residence, was rejected because the appellant did not qualify, having not been lawfully resident for 10 years. Although it had not been separately advanced, the provisions relating to partners were considered and again were determined not to apply because the appellant and his partner had not been living together in a relationship akin to marriage for at least two years prior to the application.

7. The private life claim was considered by reference to paragraphs 276ADE and following. This required, as applied to the appellant, that there would be very significant obstacles to his integration in Nigeria. It was determined that such obstacles did not exist, in part because the appellant had spent the majority of his life in Nigeria, which would be familiar to him, and had the benefit of his United Kingdom university education and experience to assist him in establishing himself in Nigeria.

8. The issue of exceptional circumstances was then addressed. The matters relied upon by the appellant were set out and were determined not to comprise exceptional circumstances. The emotional and other ties the appellant had to England were not such that requiring him to move to Nigeria would breach his Article 8 rights. There was also no evidence that the appellant's partner could not relocate to Nigeria. The appellant had the right to live and work in Nigeria and, as referred to above, it was considered that he had the benefit of his United Kingdom education and experiences to assist him in re-establishing himself in that country. It was not accepted that the appellant could not reconnect with his family and friends, but even if he could not, he had demonstrated by what he had done in the United Kingdom that he could live independently of them.

9. Finally, the letter dealt with the question of whether the Secretary of State was satisfied that the claim was not clearly unfounded. It was determined the claim was clearly unfounded on consideration of all the evidence. The requirements of the Rules were not met, and the appellant had not raised any circumstances that could be considered to be exceptional. This part of the letter specifically addresses the appellant's reliance on having a British fiancée with whom he was living and on his ties with the United Kingdom and his stated lack of ties with Nigeria. The human rights claim was found to be "clearly without substance" and it was considered that it could not "succeed on any legitimate view".

10. I should also mention that the decision letter contained a section, clearly cut and pasted from another letter, rejecting the appellant's application for leave to remain as a parent, a claim which he had never advanced.

Judicial Review

11. In support of the claim for judicial review, it was asserted that the Secretary of State's decision had been "a wholly unfair, irrational and wrong decision". Other, similarly broad assertions were made.

12. Three specific grounds were advanced. One related to the mistaken inclusion in the decision letter of a claim by the appellant to be a parent. This mistaken inclusion had no effect on the merits of the decision or the substantive matters in fact relied upon by the appellant and was therefore immaterial.

13. The second specific ground was based on the contention that the Secretary of State had failed to take into account that the appellant was engaged to his partner and as a result had failed properly to apply the Rules or Article 8.

14. The third ground was that the Secretary of State had wrongly determined that the appellant had "not demonstrated that relations with friends and family could not resume if (he) returned to Nigeria". It was argued that, as a result, the Secretary of State had not properly considered the appellant's application and had acted in breach of Article 8 because the appellant's family life had not been properly considered.

15. The application for permission was refused on the papers. As to the second ground, the appellant's partner was not within the definition of "partner" under the Rules because of the provisions of E-LTRP 1.12, which excluded from the definition a person to whom the applicant was engaged unless the applicant had been granted entry clearance as that person's fiancée. It was also noted the Secretary of State had taken this matter into account when considering the claim under Article 8. As to the third ground, the judge considered that, on the evidence, the appellant's claim was bound to fail.

16. After an oral hearing Jay J refused permission for the following reasons:

> "^(1) There is no arguable basis for impugning the defendant's section 94 certificate; (2) the applicant was not entitled to indefinite leave to remain on the basis of ten years' continuous residence; (3) there is no arguable flaw in the defendant's consideration of the Article 8 issues. The defendant appears to have erred in relation to the child, but that error could only have helped the applicant, not hindered him."

Appeal

17. The appellant's application for permission to appeal to the Court of Appeal was refused on the papers but was granted after an oral hearing limited to the issue of certification. The case was not reformulated on the papers after the limited grant of permission. However, in order to determine whether the Secretary of State was entitled to certify the claim, the court had itself to determine whether the claim would be bound to fail. This is what the Upper Tribunal judge decided on the papers and what Jay J decided at the oral hearing.

18. Before turning to the succinct and helpful submissions made by Mr Aslam today, I propose to summarise the case as it was advanced on the papers. The three grounds of appeal initially advanced were as follows: (1) the respondent wrongly did not take into account the appellant's life in the UK and, further, the respondent's decision was a breach of Article 8. Jay J erred in not considering this breach of the European Convention; (2) the respondent wrongly gave no compassionate consideration to the appellant's application for leave to remain; (3) the appellant met the respondent's suitability requirements for leave to remain.

19. The only one of these grounds which even arguably engages with the issue of certification is ground 1. It was argued that the Secretary of State's decision was in breach of Article 8 because of the nature and quality of the appellant's life in, and connections with, the United Kingdom and the absence of connections with Nigeria. It cannot be argued that Jay J failed to consider whether Article 8 would be breached by the appellant's removal from the United Kingdom because, as referred to above, he expressly determined that there was no arguable flaw in the Secretary of State's consideration of the Article 8 issues.

20. In his submissions today Mr Aslam has accepted that the appellant did not meet the requirements of the Rules. In respect of whether there was an arguable case or a legitimate view on which an appeal to the First-Tier Tribunal might or could succeed, Mr Aslam advanced the following factors as being capable of comprising exceptional circumstances, namely: the appellant's family life in the United Kingdom; his immigration history, including that he was lawfully in the United Kingdom until March 2014; that he had studied for six years and obtained a bachelor's degree in mechanical engineering; that he has significant ties with the United Kingdom and diminishing or no ties with Nigeria; and his relationship with his partner (although at the date of the commencement of the appeal they were engaged, as set out in the Grounds of Appeal, that engagement has since ended).

21. As I have said, Mr Aslam advances these matters as being capable of amounting to exceptional circumstances and as demonstrating that the Secretary of State's certification was flawed.

22. In his submissions in response Mr Chapman has referred, among other cases, to *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60, *R(Agyarko) v SSHD* [2017] UKSC 11, and *R(Kiarie and Byndloss) v SSHD* [2017] UKSC 42. He submits that Jay J was right to conclude that there was no arguable basis for impugning the Secretary of State's section 94 certificate.

Determination

23. Turning now to my determination: given the circumstances of this case, I can set this out shortly.

24. The appellant, as rightly accepted by Mr Aslam, did not meet the requirements of the Rules. His claim within the Rules was therefore clearly bound to fail. The remaining question is whether his claim outside the Rules, that his removal from the United Kingdom would breach his Article 8 rights, was likewise bound to fail. As submitted by Mr Chapman, a number of factors are engaged: namely, the strong public interest in effective immigration control; the weight to be afforded to the Secretary of State's assessment; the relevance of family life and indeed private life having been established when the person's immigration status was precarious such that, to quote from Lord Reed JSC's judgment in *Agyarko*, "it is 'likely' only to be in exceptional circumstances that… removal…will constitute a violation of Article 8". We have also been referred, by both Mr Chapman and Mr Aslam, to sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002.

25. Are the circumstances of this case exceptional? Is there anything very compelling in this case? Will the consequences of the appellant's removal cause unjustifiably harsh consequences? In view, the clear answer to all these questions is no. There are, as I see it, no exceptional circumstances in this case. None of the matters relied on and advanced by Mr Aslam during the course of the hearing today could even arguably lead to the conclusion that his removal would be disproportionate.

26. Accordingly, in my view, Jay J was right to refuse the application for permission to bring a judicial review claim as being hopeless and accordingly I propose that this appeal be dismissed.

LADY JUSTICE ASPLIN:

27. I agree.

LORD JUSTICE HADDON-CAVE:

28. I also agree.

Order: Appeal dismissed.