Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06279/2013

THE IMMIGRATION ACTS

Heard at Field House
On 29th October 2013

Determination Promulgated
On 7th November 2013
…………………………………

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

OMOLOLA OLASODE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Chukwudolue, Moorehouse Solicitors
For the Respondent: Miss H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Blackford made following a hearing at Taylor House on 12th July 2013.

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Background

2. The Appellant is a citizen of Nigeria, born on 3rd November 1966. She came to the UK on 15th October 2010 with leave until 30th September 2012 as a Tier 4 (General) Student.

3. On 17th September 2012 she applied for variation of her leave to remain on the basis of her marriage to Olaelel Ebeneezer Olasode which had taken place on 8th August 2012. She accepted that she could not meet the requirements of the Rules because her husband was not in a position to meet the financial provisions. He had been working until 2010 but was now on benefits, as was she, and sought to remain in the UK on Article 8 grounds.

4. The judge accepted that the marriage was subsisting but said that he could not see any exceptional circumstances in the case. She joined her husband to be in the UK when he was here unlawfully and when at a time when she in the UK for a temporary purpose to study. There was no expectation that she would be able to remain in the UK. He said that he agreed with the Respondent's analysis in relation to the Immigration Rules and said that there were no insurmountable obstacle in the way of the Appellant returning to Nigeria with her husband.

5. Separately he considered Article 8 on Razgar principles and wrote as follows:

> "I have no difficulty in coming to the conclusion that the Appellant's removal from the UK would be proportionate to the legitimate aim of immigration control. As I have indicated above the Appellant came to the UK at a time when her husband was here unlawfully. She could have had no expectation that she would be able to remain in the UK. I do not find that there are serious problems in her returning to Nigeria with her husband if he chooses to accompany her. As Mr Jack observed, the Appellant ha not shown that she has no assets in Nigeria. The Appellant had the funds in her application and her travel to study in the UK. I agree with Mr Jack that that must have been a costly undertaking."

He dismissed the appeal on Article 8 grounds and treated the Section 47 removal decision as withdrawn.

The Grounds of Application

6. The Appellant sought permission to appeal on the grounds that the judge had erred in laws in considering the proportionality of removal. In the case of MF (Article 8 new Rules) Nigeria [2012] UKUT 00393 the Upper Tribunal held that it was duty bound to consider the application on human rights grounds and cannot be decided on the basis of the Home Office Rules alone as set out in Appendix FM. The judge had erred in his findings and the Appellant is a victim of judicial error.

7. Permission to appeal was granted by Judge Brunnen on 22nd August 2013 on the grounds that it was arguable that when assessing proportionality the judge applied

an incorrect test as to whether the husband could accompany her to Nigeria. He held that there was not any serious problem in her returning to Nigeria with her husband if he chose to do so but arguably the question to be addressed was whether that would be reasonable in all the circumstances.

8. On 9th September 2013 the Respondent served a reply defending the determination.

Submissions

9. Mr Chukwudolue relied on his grounds and the grant of permission and submitted that the judge had applied the wrong test. The Appellant's husband was a Nigerian national but settled in the UK having coming here in 1990 and obtained indefinite leave in 2012. The judge erred in not focusing on his situation. The Appellant had leave to remain here as a student at the time of application and was here lawfully.

10. Miss Horsley relied on the decision of the High Court in Nagre R on the application of v SSHD [2013] EWHC 720 and submitted that there was "full coverage of an individual's rights under Article 8 in all cases by a combination of the new Rules and (so far as may be necessary) under the Secretary of State's residual discretion to grant leave to remain outside the Rules" (paragraph 35).

11. The Secretary of State accepted that the new rules did not provide a complete answer in every case but, together with the Immigration Directorate Instructions 3.2.8 set out the exceptional circumstances in which a grant of leave would be appropriate.

12. She relied on the Court of Appeal decision in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 which held that the new Rules were a complete code. The older cases relied upon by the Appellant had been decided without the benefit of the new Rules which set out a more stringent test than mere hardship or inconveniencies.

13. The judge had considered the case on the correct financial basis. The Appellant had not shown that family life could not be continued in Nigeria. She could not meet the requirements of the Rules and it was not the purpose of Article 8 to permit their circumvention. Any properly directed Tribunal would have come to the same conclusions.

14. By way of reply Mr Olosode repeated that the Tribunal was obliged to conduct a fact finding exercise in respect of Article 8 in circumstances where the Rules could not be satisfied and the Respondent was wrong to introduce an insurmountable obstacles test.

Findings and Conclusions

15. In Nagre Sayles J stated:

> "The approach explained in the Strasbourg case law indicates that where family life is established when the immigration status of the claimant is precarious removal will be disproportionate only in exceptional cases; and also their consideration of whether there are insurmountable obstacles to the claimant's

residence spouse or partner relocating to the claimant's country of origin to continue their family life there will be a highly material consideration. This is not to say that the question whether there are insurmountable obstacles to relocation will always be decisive. The statement of general approach referred to above refers to a range of factors which may bear upon the question of proportionality."

16. This Appellant came to the UK in order to study and married an individual who had been in the UK unlawfully for 20 years having overstayed his visit visa and working in breach of the conditions of that visa. He became settled in the UK relatively recently and remains a citizen of Nigeria.

17. The Appellant does not meet the requirements of the Immigration Rules because her husband is on benefits. She does not meet EX1B because although she has been found to have a genuine and subsisting relationship with a person settled in the UK no insurmountable obstacle to family life have been identified to her life with him continuing in Nigeria, the country of which they are both nationals.

18. In paragraph 3.2.8 of the Immigration Directorate Instructions the decision maker is asked, in determining whether there are exceptional circumstances, to consider all relevant factors including whether the relationship was formed at a time when the applicant had either no immigration status or it was precarious. In this case the Appellant's status was temporary.

19. She plainly neither meets the requirements of the Rules nor of the Secretary of State's policy as set out in those IDIs.

20. In Nagre Sayles J recorded that the Secretary of State was not contending that the effect of the new rules was to restore an exceptional circumstances test evaluate to that rejected by the House of Lords in Huang and by the Upper Tribunal in Iswazu. The Secretary of State accepted that consideration of what is possible in Article 8 claims arising outside the new Rules involves broader consideration of cases by reference to the general factors and the approach set out in the new guidance on her "residual discretion".

21. In this case the judge did not consider the new Rules to be determinative and examined the Article 8 claim on traditional Razgar principles. He was perfectly entitled to consider the sponsor's immigration history as an adverse factor and indeed that the Appellant's status was temporary. There was no error in referring to the lack of serious problems in her returning to Nigeria with or without her husband.

Decision

22. The original judge did not err in law. His decision stands.

Signed Date

Upper Tribunal Judge Taylor