



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/05297/2014

THE IMMIGRATION ACTS

Heard at Field House

On 29 October 2014

Determination

Promulgated

On 3 December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

**MARIANA EFIOK EKOP
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paul Corben, of Counsel

For the Respondent: Mr C Avery, a Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria who first came to the UK as a student on 3 March 2004. As a result of various extensions to her leave she has remained in the UK since her first arrival. One of her applications was to settle as the spouse or partner of a person present and settled here. At that time the appellant was here as a Tier 4 Migrant. That application was refused on 20 May 2013 and a subsequent appeal to the First-tier Tribunal was dismissed by Immigration Judge Knowles on 13 January 2014. A subsequent attempt to appeal that decision was also unsuccessful.
2. An essential feature of the oral submissions before the Upper Tribunal was the fact that the appellant apparently fell into a trap. She claims that her ten years of lawful residence came to end on 29 March 2014. Apparently,

her rights to appeal had come to an end on 5 March 2014. The appellant became an illegal overstayer at that point. This disqualified her from applying under the rules.

3. To remedy this, the appellant made an application for asylum on 7 July 2014 which was also refused. The respondent issued a supplementary refusal letter to deal with that application on 8 August 2014. On 19 August 2014 Immigration Judge Gibb (“the Immigration Judge”) heard the appellant’s appeal at Yarl’s Wood. He decided, having carried out an assessment, that there were unusual circumstances on the material before him which enabled him to find that it would be unjustifiably harsh to return the appellant to Nigeria. Accordingly, he allowed her appeal on the basis that Article 8 (“Article 8”) of the European Convention on Human Rights (“ECHR”) was engaged so as to prevent her removal from the UK.
4. The present appeal is therefore by the respondent against the decision of the Immigration Judge to allow the appellant’s appeal against the respondent’s decision to refuse her claim on human rights grounds. Following the appeal to the Upper Tribunal there was an initial refusal by Immigration Judge levins and an initial refusal on a renewed application before Upper Tribunal Judge Gleeson. However, Judge Gleeson subsequently decided there had been a procedural error. The procedural error is referred to in paragraph 1 of her grant of permission. In particular, she had found the appeal to be by the appellant when in fact it was by the respondent and therefore had the effect of finally disposing of the matter. She made her decision by reference to Rule 43 of the Upper Tribunal (Procedure) Rules 2008. In particular, the Upper Tribunal Judge identified two principal criticisms of the decision of the First-tier Tribunal which amounted to arguable errors of law. In particular it was arguable that:
 - (1) the Immigration Judge had erred in considering the “unusual” circumstances of the case when that was not the correct test as set-out in recent case law on Article 8;
 - (2) the Immigration Judge had apparently not attached sufficient weight to the earlier adverse decision of Immigration Judge Knowles having regard to the leading case of **Devaseelan [2001] HR/A3442/001**.
5. A hearing was fixed for 29 October 2014 in light of which the usual directions were issued limiting evidence to that before the First-tier Tribunal.

The Hearing

6. I heard submissions by both representatives. The appellant attended the hearing but did not give any oral evidence.
7. Mr Corben began by explaining that he had not received all the documents before the Tribunal. In particular, he later explained, he did not believe that he had the first notice of appeal considered by Judge levins. However he did not claim that he was materially handicapped by the absence of

that document and the issues before the Tribunal were carefully identified by Mr Avery at the outset of the appeal hearing.

8. Mr Avery began his submissions by explaining that the appellant had built up significant ties in the UK but the circumstances had to be compelling before the appellant could bring herself within the ambit of Article 8 outside the Immigration Rules. This case did not satisfy those criteria. Furthermore, the Immigration Judge appeared to be saying that the appellant was in a "near miss" situation and to have allowed the appeal on that basis. This was the wrong approach. He also explained that the case of **Devaseelan** required the Immigration Judge to have regard to the findings of the earlier Tribunal but he had failed to do so. In summary, the appellant had no expectation that she would be allowed to remain in the UK at the end of her leave. The absence of any criminal behaviour by her or the fact that she had established some private life here after many years of residence did not justify the decision of the First-tier Tribunal to allow her to remain on the grounds of Article 8.
9. Mr Corben began with a preliminary objection to the way the matter had come before the Upper Tribunal. He said that Judge Gleeson had not, in his submission, jurisdiction to re-open the question of permission. He referred me to paragraph 43 of the Procedure Rules and in particular to sub-paragraphs (1)-(2) thereof. He said that the decision to set aside on grounds of procedural irregularity in the earlier refusal of permission was wrong. Judge Gleeson had considered the matter as a procedural irregularity when in fact there was no such irregularity. He submitted by reference to a number of other Procedure Rules that she had construed the relevant Rule incorrectly. Her decision was "*ultra vires*". He then turned to the merits and said that the appellant had been lawfully in the UK from April 2004 to March 2014 (ten years less nine days). A 28 day period of overstaying would have been ignored but unfortunately the appellant had failed to spot this. It was in that context that her private life needed to be considered. It was submitted indeed, that this changed "everything" and fully justified the decision by the First-tier Tribunal. I was referred to paragraph 56 of the determination of the First-tier Tribunal where the Immigration Judge had referred to "weighty matters" in support of the appellant's claim. However, as far as the "near miss" argument was concerned I pointed out to Mr Corben this appeared to have been rejected by the Immigration Judge. Mr Corben rejected the **Devaseelan** argument reminding the Tribunal as to exactly what that case said. He referred, in particular, to paragraphs 37-38 of that decision. He said that Judge Knowles was dealing with a different situation and that departure from his decision was therefore justified. It was not clear in what respects the factual circumstances before Judge Knowles were different from those before Judge Gibb.
10. Mr Avery briefly replied on behalf of the respondent to say that the appellant had not raised the procedure argument prior to the hearing, despite having over one month to deal with the point raised from Judge Gleeson's grant of permission dated 19 September 2014. The point was an entirely technical one which would have required considerable research

by him. He had not come prepared to deal with this and I was invited to dismiss it for the lack of proper notice having been given in accordance with the requirement for procedural fairness. Although the Immigration Judge appeared to have rejected the argument that the appellant was a “near miss” person he ought to have attached greater weight to Judge Knowles’s decision.

11. At the end of the hearing I decided it was not appropriate to allow the appellant to advance an argument that permission to appeal should not have been given as the respondent had not been given advance notice of this application. It was inappropriate to prevent the parties addressing the Tribunal on the merits of the appeal in circumstances where both parties had come prepared to address the substantive issues. I reserved my decision on the error of law issue before the Upper Tribunal.

Discussion

12. The appellant is a Nigerian national, who originally came to the UK as a student in 2005 and has subsequently stayed on a number of other bases. She sought leave to remain as a person present and settled here but that application was rejected by the respondent in May 2013, who decided to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.
13. The appellant unsuccessfully appealed that refusal decision to the First-tier Tribunal (“FTT”). The matter came before Judge Knowles on 3 January 2014 and was dismissed by him on 13 January 2014. He found the appellant’s account of having been married to Mr Tshibamba-Mpia (“the sponsor”), a British citizen, to be fabricated for the purposes of her immigration application. There was no loving relationship between them and her husband had not even attended the hearing to give evidence. She also claimed to have a close relationship with his two daughters, Regine and Grace. There were letters or greetings cards from those children to their father or to the appellant but the Immigration Judge was far from persuaded about any of this evidence.
14. A subsequent appeal against the decision by Immigration Judge Knowles to dismiss the appeal against the refusal of leave to remain/to issue removal directions failed when Judge of the First-tier Tribunal Davey found the decision disclosed no arguable errors of law and refused permission to appeal to the Upper Tribunal. Indeed, the adverse credibility findings were allowed to stand and paragraph 7 of his refusal of permission notes that there was “no challenge to the judge’s conclusion with reference to **Gulshan ([2014] UKUT 640 (IAC))** that Article 8 ECHR was not engaged outside of the Immigration Rules”.
15. According to Immigration Judge Gibb, whose decision was promulgated on 19 August 2014, the appellant became an overstayer on 10 March 2014. On 7 July 2014 she claimed asylum on the grounds that she was a lesbian. This was rejected by the respondent on 8 August 2014. Immigration Judge Gibb had to deal with her appeal against that decision. In the material

parts of his determination, he found there to be “unusual facts” which he felt were compelling. These led him to conclude that the appellant should be allowed to remain under Article 8 of the ECHR despite being unable to meet the requirements of the Immigration Rules.

16. In a notice of decision dated 19 September 2014 Upper Tribunal Judge Gleeson decided to revise her earlier decision to refuse permission to appeal to the respondent. She gave her permission that it was in the interests of justice to do so pursuant to Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. That Rule allows the Upper Tribunal to set aside “a decision which disposes of the proceedings” and re-make the decision or the relevant part of it.
17. It was argued before me that none of the conditions in paragraph 43(2) of those Rules were in fact met. However, it would seem that sub-paragraph (2) (d) would have applied here and therefore Upper Tribunal Judge Gleeson was entitled to exercise her discretion under that Rule.
18. There were two fundamental points raised in this appeal:
 - (1) Judge Gibb failed to have adequate regard to the guidance given by the Immigration Appeal Tribunal in the case of **Devaseelan [2002] UKIAT 00702***.
 - (2) Judge Gibb failed to address the correct test under Article 8 of the ECHR having regard to the case law including the case of **Nagre [2013] EWHC 720 (Admin)**.
19. The grounds are set out clearly and succinctly by the respondent. In relation to the **Devaseelan** point Judge Gibb failed to have any regard to the context of the decision reached by Immigration Judge Knowles and the absence of any material change in circumstances. Essentially, as Immigration Judge Gibb found, the appellant had deliberately set out to deceive the Immigration Judge about the nature and extent of her relationship with her husband. At paragraph 29 of Judge Gibb’s determination he points out that the appellant, with full knowledge of Judge Knowles’s mistake, had deliberately not told the judge that she and her husband were no longer “together”. Later in his determination (at paragraph 57) he accepted that the marriage was not genuine and that there was “some attempt by the appellant to deceive the judge at this hearing” (referring to the hearing in January 2014). It is surprising therefore that Judge Gibb also concluded that it had “not been established that this was not a genuine marriage” in paragraph 29 of his determination. These facts ought to have led Judge Gibb to conclude that the appellant essentially had no continuing family life in the UK, including any contact with the sponsor’s children, and that her credibility was highly doubtful. Immigration Judge Knowles had reached comprehensive findings which had not been attacked on appeal earlier the same year. There appears to have been no material change in circumstances since the hearing in January 2014 and Judge Gibb should have adopted as his starting position the decision of Judge Knowles having regard to the

Devaseelan guidance. That guidance includes treating earlier decisions as authoritative on the facts and issues argued before the tribunal in question. Judge Gibb ought to have concentrated on any new matters arising. There appear to be none that are material. He should have been conscious of the need to ensure consistency of approaches as between the two Tribunal hearings. I find that Immigration Judge Gibb did not have proper and adequate regard to the guidance given in the **Devaseelan** case.

20. Turning to Article 8 of the ECHR, the circumstances in which it is justified to depart from the requirements of the Rules need to be “compelling” or the consequences of removal “unjustifiably harsh” before this Article may be invoked to prevent a removal that would otherwise be lawful. The context in which the hearing before Immigration Judge Gibb took place was that the appellant had, based on his own findings, made a hopeless claim for asylum and for human rights protection under Article 3 of the ECHR on 7 July 2014 as well as an unmeritorious application under 276B of the Immigration Rules as a means of preventing her removal. Immigration Judge Gibb himself correctly concluded that there was no merit in those claims and I note that Mr Corben, who represented the appellant at the hearing before Judge Gibb, decided not to even pursue the claim under 276B of the Immigration Rules (see paragraph 11 of the determination). **Gulshan** and **Nagre**, are referred to by Immigration Judge Gibb. However, I find that the learned Immigration Judge did not adequately consider or apply the test set out in those cases. Two stages are necessary:

- (1) Whether the application should succeed under the Rules?
- (2) If not, whether there were compelling circumstances or otherwise unjustifiably harsh consequences of removal requiring the Tribunal to go beyond the Rules?

21. The Immigration Judge characterised the case as “unusual” and treated this as synonymous with “exceptional” and referred to the cases of **MM Lebanon** and the case of **Patel** but it seems that in fact there was nothing “compelling” or “unusual” about the appellant’s case. The appellant had fabricated a relationship with her UK sponsor, pretended to be a lesbian, which the Immigration Judge rejected, but had in fact formed no family life in the UK. The Immigration Judge failed to pay adequate regard for the need to control unauthorised and uncontrolled immigration into the UK, which was a weighty factor. This is despite referring to the changes introduced to the Nationality, Immigration and Asylum Act 2002, part 5A by Section 19 of the Immigration Act 2014. Immigration Judge Gibb himself concluded that he had been presented with a witness statement which was described as “weak in credibility terms” in paragraph 25, that the appellant’s evidence had been “misleading in places” and he gave “negative weight to the timing of her claim”. He did not accept her evidence that she had broken up the marriage to the sponsor because of being a lesbian, indeed, he did not accept that she was a lesbian at all.

22. The Immigration Judge identified a “sliding scale” of cases. On one side of the scale were those cases where the Immigration Rules were a complete code, such as those involving foreign criminals, but on the other were those cases where a “proportionality test” was required. However, having said that the case was “finely balanced” the Immigration Judge then failed to take account of all factors in reaching his conclusions. Having concluded that the ongoing relationship with the sponsor was essentially fabricated the Immigration Judge ought to have gone on and considered whether there were any factors that made her case compelling. The factors referred to in paragraph 58 of the determination were simply neutral. The factors set out in paragraph 34 were material but I am not persuaded that they were sufficiently material to lead any reasonably directed Tribunal to conclude that the appellant could not be removed from the UK. In particular, she has described as having studied and worked in the UK, to having friendships and to attending church regularly. She is also said to have suffered medical conditions of the types described, although none of them were said to have qualified her for any right to remain in the UK under Article 3 of the ECHR. The Immigration Judge also took into account her overall length of residence. However, he failed to consider the need to respect immigration control and the fact that the appellant’s presence in the UK had been governed by the terms of her leave. She had no expectation of any right to remain here beyond that leave.

My Conclusions

23. The Immigration Judge’s conclusion that the appellant’s circumstances were such that she had an “unusual and significant private life ties to the UK built up over a significant period” which rendered the respondent’s decision “disproportionate” was one that is unsustainable. The factors in this case had been fully taken account of by the earlier determination of Judge Knowles and in any event there was nothing “compelling” or “unusual” about the facts. The appellant had formed a private life in the UK in the full knowledge that she would have to return to Nigeria at the end of her stay and not in any expectation that she should be allowed to permanently settle in the UK.
24. Having regard to the case law summarised above I have therefore concluded that there is a material error in the decision of the First-tier Tribunal and that decision should be set aside and substituted with the decision of the Upper Tribunal.

Decision

The Upper Tribunal finds a material of law in the decision of the First-tier Tribunal. It therefore sets aside that decision. The appeal by the Secretary of State is allowed. The following decision is substituted.

The appeal against the decision of the Secretary of State to refuse further leave to remain and/or to issue removal directions is dismissed.

The appeal has unsuccessful and I therefore make no fee award.

There has been no request for, and I do not make any anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Hanbury