



IAC-TH-CP-V1

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

Appeal Number: IA/15516/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 14<sup>th</sup> November 2014**

**Determination Promulgated  
On 10<sup>th</sup> December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

**MRS CHINONYE ONONIWU**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr C Ijezie (Solicitor)

For the Respondent: Mr T Wilding (Senior Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The appellant's appeal against decisions to refuse to vary her leave and to remove her from the United Kingdom by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 was dismissed by First-tier Tribunal Judge Raymond ("the judge") in a determination promulgated on 6<sup>th</sup> August 2014. The judge determined the appeal on the basis of the documentary evidence before him in the light of the appellant's indication in her notice of appeal that she did not require an oral hearing.

2. The judge found that the appellant had worked more than twenty hours per week, thereby breaching the conditions attached to her student leave. This leave was extended under section 3C of the Immigration Act 1971. He found that the period in which the appellant worked in excess of the permitted hours began in about September 2012 and extended through until 2013 and even up to the date of his assessment in July 2014.
3. The Secretary of State also refused the application for leave (which was made on the basis of the appellant's relationship with her spouse) on the basis that no sufficient proficiency in English had been shown. The appellant relied upon a letter from NARIC dated 22<sup>nd</sup> April 2014, in which it was stated that the degree she obtained was considered comparable to a British bachelor degree. The judge found that no proper explanation had been given for why NARIC confirmation did not accompany the application made by the appellant in September 2012 and taking into account a letter from Leicester College which appeared not to assist her case, the judge concluded that this ground of refusal was made out.
4. The Secretary of State also refused the application under E-LTRP.3.2 because the appellant's gross wages could not be accepted (as it appeared that they were earned in breach of conditions attached to her leave) and her husband's income alone did not meet the minimum income threshold of £18,600. The judge noted that in the application she made, the appellant claimed to have an annual income from "permanent" employment with a care agency of £11,543.88 per annum, whereas her husband's income was less, in the sum of £8,993.10. There appeared to be no P60s showing her husband's income for 2012 to 2013. Overall, the judge concluded that the income available did not meet the minimum income threshold. He went on to assess whether there were obstacles to family life continuing between the appellant and her husband outside the United Kingdom. He concluded that there were none which were insurmountable. Finally, the judge took into account the Secretary of State's finding that the private life requirements of the rules in paragraph 276ADE were not met by the appellant, who arrived here from Nigeria in June 2011 and he concluded that the appellant had not shown that this particular finding was unlawful. There were no exceptional circumstances in the case which would justify the grant of leave to the appellant outside the rules, on Article 8 grounds.
5. An application was made for permission to appeal. It was contended on the appellant's behalf that as her studies came to an end in September 2012, she was entitled to work full-time "during vacation which includes period after completion of her studies". The judge erred in finding that the appellant was not entitled to rely on her full earnings. The judge also erred in relation to a letter from NARIC dated 22<sup>nd</sup> April 2014, which showed that the appellant's degree was taught in English. Moreover, the level of English

required for a spouse is A1, below level C1, which was assessed by NARIC as the level achieved by the appellant in her studies. Finally, it was contended that the judge erred in finding that there were no insurmountable obstacles to family life continuing in Nigeria. It was not in dispute that the appellant and her husband had a genuine and subsisting marital relationship. Her spouse was a British citizen and his parents and siblings were settled here as well.

6. Permission to appeal was refused and the application then renewed. An Upper Tribunal Judge granted permission on 10<sup>th</sup> October 2014, finding that the judge may have erred in relation to his assessment of proficiency in the English language and that it was arguable that he should have taken into account the appellant's income. She also considered that the adverse conclusion in relation to Article 8 may have been based on a flawed assessment under the rules.
7. In a rule 24 response dated 21<sup>st</sup> October 2014, the Secretary of State indicated that the appeal was opposed. The judge directed himself appropriately and noted, at paragraph 26 of the determination, that the appellant's payslips recorded employment considerably in excess of the permitted maximum and therefore in breach of the rules.

#### **Submissions on Error of Law**

8. Mr Ijezie said that reliance was placed upon the grounds in support of the renewed application, dated 9<sup>th</sup> September 2014. The key issue was whether the appellant had worked in breach of the rules. If she had not, that would demonstrate a material error in the decision.
9. The appellant submitted an in-time application for leave as a spouse and so the student leave she had at the time was extended by virtue of section 3C of the Immigration Act 1971. Her student leave entitled her to work twenty hours per week during termtime but for an unlimited amount of time in vacations. It was not disputed that the appellant's studies came to an end in September 2012 and from then on, she should be deemed to have been on vacation and entitled to work as much as she wished. Paragraph 245ZY(c)(i) made it clear that the appellant was entitled to work for not more than twenty hours during termtime but could work for any duration in vacation. The judge was wrong to conclude that the appellant did not have the right to work unlimited hours.
10. Secondly, the NARIC letter at pages 2 to 3 of the bundle before the judge showed the level of proficiency in the English language. The appellant relied on a BA qualification from a Nigerian university, comparable to British BA standard. There was post-decision evidence available to the Tribunal in the form of a second NARIC letter dated 22<sup>nd</sup> April 2014. This

evidence was admissible under section 85(4) of the 2002 Act. The judge was able to consider all the evidence, including the new evidence, as at the date of the hearing. If this evidence were accepted, the appellant met the English language requirements. There was also a letter before the judge from Leicester International College, confirming what appeared in the CAS the appellant was given. The letter described her as having good competence in English and as suitable for her course, a graduate diploma in management studies. These showed that the appellant had a proficiency which was higher than A1, the level required for spouses. She was at least at level C1.

11. Mr Ijezie suggested that no submissions were required in relation to the financial requirements of the rules as the Secretary of State accepted that they were met. So far as EX.1 was concerned, the appellant's case was that there were insurmountable obstacles to family life continuing in Nigeria. Her husband was a British citizen who could not be forced to live in Nigeria. He had integrated fully into British society. If the appellant were removed, this would be unlawful. It was clear from Community law that even where a spousal relationship was formed at a time when a person had precarious immigration status, the state was still required to conduct a proportionality exercise before seeking to remove a person. Here, there was no legitimate aim outweighing the appellant's right to remain with her British citizen husband.
12. Mr Wilding said that the decision contained no material error of law in any respect.
13. What the evidence showed, and what was apparent in the judge's assessment, was that it was entirely unclear whether the appellant ever pursued the course for which she was given Tier 4 Student leave. There was confusion regarding the hours she worked between April and September 2012. She only had twenty hours a week available for employment during her studies. She was able to work full-time in vacation. The difficulty she faced, as shown by paragraph 26 of the determination, was that the judge found that the payslips she relied upon showed that beginning in August or September 2012, she was working more than twenty hours per week. The earliest payslip made available seemed to be dated 20<sup>th</sup> September 2012, which appeared to show 103.25 hours. She was also accruing annual leave "units". The judge made the point at paragraph 24 that the 2012 P60 the appellant relied upon appeared compatible with part-time work not exceeding twenty hours between September 2011 and 1<sup>st</sup> April 2012 but it shed no light on what happened after that. The appellant made available no payslips for the period April to September 2012.
14. Keeping the focus on the September 2012 payslip, the year to date figure appeared to show earnings of £5,751. The August to September 2012 total

earnings were £977 and that suggested that in the five months between April 2012 and August that year, the appellant's earnings were about £850 per month.

15. There was, in fact, no clear evidence regarding when the appellant completed her course. The letter before the judge from Leicester College indicated only that the appellant had sat exams and was waiting for a result. At paragraph 23 of the determination, the judge weighed the evidence and found that the working hours shown in the payslips suggested that the appellant had failed her studies, not least as she might well have stated in evidence that she had been awarded the ICM diploma, if she had in fact been successful.
16. The Secretary of State's position was that if a person studied and completed a course, employment might be available but if a person failed or dropped out then student leave would lapse and a person would not have permission to work. For section 3C leave to arise and take effect, the appellant would have to show completion of her studies but the evidence made available to the judge did not support such a finding. Overall, the judge came to a sustainable conclusion in relation to the working hours, in the light of the limited evidence before him. All he had to go on was what appeared in the appellant's bundle.
17. The appellant's own witness statement appeared not to include a claim that she successfully completed her course. The evidence before the judge simply did not show that the appellant had the qualification she embarked on her studies to achieve, in 2011. The findings made by the judge were open to him on the evidence.
18. Turning to the proficiency in the English language aspect, Appendix FM and FM-SE were relevant here. The appellant's case was that she had a qualification recognised by NARIC. The relevant rule appeared in the current edition of Phelan at page 1040 and at page 1069. What FM-SE required was evidence of an academic qualification recognised by NARIC, the evidence being either a certificate issued by the relevant institution confirming the award or an original academic reference from the institution awarding the academic qualification. The appellant relied on letters from NARIC but neither met this requirement. Although the letter suggested that the appellant had CEFR level C1, the rules required evidence that the qualification was equivalent to a British degree and taught in English. Neither of the NARIC letters confirmed this.
19. Finally, dealing with the Article 8 aspect, the appellant had only limited leave and so her status was precarious. The judge gave cogent reasons why there were no insurmountable obstacles to family life continuing in Nigeria. Of course, the appellant's husband could not be forced to go there as he was

a British citizen but the judge had this fact in mind. Again, all the judge had before him was the documentary evidence, including the appellant's witness statement.

20. Mr Ijezie said in response that at paragraph 25 of the determination the judge noted that the Secretary of State had not made calculations of working hours during the period June 2011 to June 2012, while the appellant was on her course. The respondent had a duty to provide reasons but had not done so here. Even though the Secretary of State had stated in refusing the application that the position was not clear, there was a duty of candour and evidence might have been invited. The Secretary of State had not made a determination on any final basis regarding the income threshold because of her conclusion that the appellant had breached the requirements of the rules. The judge was obliged to find sufficient reasons, to sustain the Secretary of State's decision.
21. On English language proficiency, Mr Ijezie maintained his stance that the letters from NARIC met the requirements of the rules, even though no evidence from the awarding body was submitted. Even though the NARIC letters might not be on all fours, he said that the requirements of the rules were met. The evidence from Leicester International College fell to be taken into account and this confirmed that the appellant was a good candidate and had good English. In any event, he said, the English language requirement was not absolute. There were exceptions to it. The appellant might rely on EX.1 as E-LTRP.4.2 applied unless that exception applied. (Mr Wilding said at this point that the adverse decisions were made on 18<sup>th</sup> March 2014 and the rule Mr Ijezie had just described came into effect on 28<sup>th</sup> July 2014.)
22. Mr Ijezie said that it was clear from the determination that no proper proportionality assessment had been made, by either the Secretary of State or the judge. The legitimate aim sought to be pursued was not identified. There was no public interest in removing the appellant and no proper consideration of her interest in remaining in the United Kingdom. Taking all of that into account, the proper outcome was a weighing of the competing interests resulting in a decision in the appellant's favour.

### **Conclusion on Error of Law**

23. For no doubt sensible reasons, the appellant decided that she did not require an oral hearing, at which she and her husband might have given evidence. Instead, she indicated that she wished her appeal to be decided "on the papers". The determination shows that the judge fully engaged with the Secretary of State's case and the detailed reasons for refusing the application and also engaged with the documentary evidence made available by the appellant, which included a witness statement.

24. It is readily apparent from the determination that the evidence made available by the appellant was, with respect to her, uncertain in several important respects. For example, the appellant suggested in her statement that her studies were completed in September 2012 but, as the judge observed at paragraph 10, it was not apparent whether she meant by this that she achieved the qualification sought, a postgraduate diploma. The examination results sent to her college showed a pass in three subjects and results awaited in another. There were other uncertainties in the evidence, including in relation to the hours the appellant worked, particularly before September 2012.
25. It is not sensibly open to the appellant to criticise the judge for making the findings he did on the limited evidence available to the Tribunal. The Secretary of State's reasons for refusing her application were unambiguous. For example, the Secretary of State's assessment of the wage slips was that they gave the appearance of working more than the permitted hours. It was up to the appellant to show that the requirements of the rules were met and that she did not act in breach of the conditions attached to her student leave and, having received the adverse decisions and commenced her appeal, it was up to her to provide sufficient evidence in support of her case.
26. The judge was, I find, entitled to weigh the limited evidence before him as he did, in relation to breach of conditions. The evidence did not clearly show any success in the course or that the appellant was awarded the qualification she sought. The judge was entitled to draw an inference that she probably failed and he was entitled to take this into account in his assessment of the evidence regarding working hours. Overall, I conclude that his assessment was open to him and that no material error of law has been shown.
27. So far as proficiency in the English language is concerned, the judge found that the evidence was not sufficient to show that the requirements of the rules were met. The appellant relied on letters from NARIC but in this context I accept Mr Wilding's submission regarding the rules. The relevant part of Appendix FM-SE requires a certificate or similar evidence from the awarding body but there was no such evidence before the judge. The letters from NARIC were in themselves insufficient to show that the requirements of the rules were met. Again, no material error of law has been shown in the judge's assessment.
28. Finally, the rather slight evidence before the judge, accepting that the genuine and subsisting relationship between the appellant and her husband is not in issue, led him to conclude that family life could be continued in Nigeria and that there were no insurmountable obstacles to this course. The appellant's husband is a British citizen but the judge did not overlook this.

Mr Ijezie submitted that neither the Secretary of State's decision nor the determination showed any proper assessment of the proportionality of the adverse decisions. I disagree. The Secretary of State considered the requirements of the rules under paragraph 276ADE, following her decision that the partner requirements of the rules were not met and the judge made a similar assessment, at paragraphs 45 to 51 of the determination. The assessment was carefully made, as paragraphs 46 and 47 show, for example. In the assessment, the judge took into account his earlier findings that the requirements of the rules were not met. It is clear from paragraphs 50 and 51 of the determination that he considered whether the appellant might succeed under Article 8 even outside the rules, concluding that she could not. I find that no material error of law has been shown in this part of his reasoning. He was entitled to conclude as he did in the light of the evidence before him.

29. In summary, the decision of the First-tier Tribunal contains no material error of law and shall stand. I gave my decision and a brief summary of my reasons at the conclusion of the hearing on 14<sup>th</sup> November and these written reasons now follow.

### **DECISION**

The decision of the First-tier Tribunal contains no material error of law and shall stand.

Signed

Date **14<sup>th</sup> November 2014**

Deputy Upper Tribunal Judge R C Campbell