



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

Appeal Number: IA/41248/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

**Decision & Reasons
Promulgated**

On 14 October 2014

On 6 November 2014

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**A A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Harrington instructed by Duncan Lewis Solicitors

For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Sierra Leone who was born on 10 June 1967. He entered the United Kingdom on 14 September 2002 with a student visa valid from 15 August 2002 until 31 October 2013. He was subsequently granted further leave as a student up until 30 March 2006. On those occasions, his wife and daughter (“J”) were also granted leave in line with the appellant’s leave, having joined him in the UK.
3. At some point, the appellant’s wife returned to Sierra Leone leaving the appellant in the UK, where he was studying and working, to look after J. On 22 March 2005, J was taken into foster care by the local authority. She has, so far as I am aware, remained in care thereafter.
4. On 21 March 2006, the appellant made an application for leave outside the Rules which was granted until 30 September 2006. Thereafter, his leave expired.
5. On 12 November 2008, the appellant made a further application for leave outside the Rules based upon a court order granting the appellant supervised contact with J. As a consequence, leave was granted outside the Rules until J’s 16th birthday from 25 August 2010 until 6 July 2011. A further application was made on 1 July 2011 and discretionary leave was granted outside the Rules until J’s 18th birthday on 6 July 2013.
6. On 5 July 2013, the appellant’s legal representatives made a further application for discretionary leave to remain outside the Rules. On 20 September 2013, the Secretary of State refused to grant further leave to the appellant and made a decision to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

The Appeal

7. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 12 June 2014, Judge Page dismissed the appellant’s appeal under the Immigration Rules (para 276ADE) and Art 8 of the ECHR.
8. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds. On 2 July 2014 the First-tier Tribunal (Judge McWilliam) granted the appellant permission to appeal on the ground that the judge had arguably erred in law in failing to make any findings on “three witnesses who gave oral evidence”.
9. Subsequently, the appellant’s legal representatives, Duncan Lewis Solicitors, renewed the appellant’s application to the Upper Tribunal presumably on the basis that the judge has only granted leave on some, but not all, of the grounds. Further, in a letter dated 12 July 2014 addressed to the Upper Tribunal, pointed out that Judge McWilliam may have misunderstood the original grounds as, although three witnesses had attended the hearing, none in fact had given oral evidence.

10. On 28 July 2014, the Upper Tribunal (UTJ Grubb) granted the appellant permission to appeal on all grounds.
11. Thus, the appeal came before me.

The Issues

12. On behalf of the appellant, Ms Harrington raised three points.
13. First, she submitted that the Secretary of State's decision was not in accordance with the law because the appellant was entitled to have his application for further leave determined under the previous "discretionary leave" policy as he had been granted leave under that policy prior to 9 July 2012. The judge had erred in law by failing to conclude that the Secretary of State's decision was not in accordance with the law.
14. Secondly, in applying para 276ADE of the Rules, the judge had approached the issue of whether the appellant had established that he had "no ties" with Sierra Leone under para 276ADE(vi) on a wrong basis. She relied upon the Upper Tribunal's decision in Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 00060 (IAC).
15. Thirdly, Ms Harrington submitted that the judge had reached a wrong conclusion in law in finding that there were no "compelling circumstances" justifying the grant of leave outside the Rules under Art 8. In particular, she submitted that he had failed properly to take into account a complaint made against the appellant's former legal representatives which had resulted in the appellant not being granted discretionary leave earlier which, if he had, would have led subsequently to a grant of indefinite leave to remain.
16. Ms Harrington also submitted that the Art 8 consideration was flawed by the judge's view that the appellant had "no ties" with Sierra Leone and had failed to take into account his private life and positive impact on the community in the United Kingdom.

Discussion

1. The 'discretionary leave' policy

17. I deal first with the issue of the "discretionary leave" policy.
18. Ms Harrington told me, on instructions, that Judge Page had been provided with a copy of this policy. Unfortunately, no copy of the policy is contained in the file and neither representative was able to provide me with a "hard" copy of the policy although I was shown it on Ms Harrington's iPad. Fortunately, the contents of the policy was not a matter of dispute between the representatives.
19. Mr Richards accepted that the transitional arrangements in the discretionary leave policy applied to an individual, such as the appellant,

who had been granted discretionary leave under that policy prior to 9 July 2012. In such a case, an application after that date for further leave on a discretionary basis would be considered under the policy. However, Mr Richards relied on the terms of the policy which made clear that a further period of discretionary leave of three years would only be granted if the “circumstances prevailing at the time of the original grant of leave continue at the date of decision”. The policy did not require the grant of that further period of leave if there were “significant changes” in the individual’s circumstances or that individual did not meet the criminality threshold. Ms Harrington agreed those were the terms of the policy. There is, of course, no question that the appellant has any antecedent criminal convictions which would disapply the policy.

20. Mr Richards submitted that the Secretary of State had considered the discretionary leave policy in her refusal letter dated 20 September 2013. In doing so, Mr Richards submitted that the Secretary of State had acted lawfully in that she had applied the policy and had come to the conclusion that the circumstances had changed. Mr Richards pointed out that the previous grant of discretionary leave was in order for the appellant to enjoy supervised contact with J, initially up to her 16th birthday and subsequently up to her 18th birthday. Mr Richards submitted that the judge had made clear factual findings that J, now an adult, no longer had regular contact with the appellant.
21. There is no doubt that a failure to apply an applicable policy results in a decision being unlawful and not in accordance with the law (see Lumba (WL) v SSHD [2011] UKSC 12).
22. It is clear to me that the Secretary of State did consider her “discretionary leave” policy in her refusal letter of 20 September 2013 and concluded that it did not apply.
23. At the outset of the letter the Secretary of State states:

“On 05 July 2013 Ty Arian solicitors applied on your behalf for further discretionary leave to remain in the United Kingdom. You have failed to show that your circumstances remain the same since your last grant of leave. Therefore, you are refused further discretionary leave to remain and the reasons are outlined below.”
24. The letter then sets out the appellant’s immigration history including the grants of discretionary leave to the appellant up to J’s 16th birthday initially and then her 18th birthday.
25. The decision letter then goes on to state:

“You were granted discretionary leave to remain on the basis of contact with your child. We acknowledge that your child is now aged 18 and is still residing with her foster carers. You are being refused discretionary leave to remain as you have not had contact with your child for the past 6 months.”

26. That, in my judgment, is a clear application of the “discretionary leave” policy and a decision that it does not apply so as to require the grant of a further period of discretionary leave because the circumstances upon which leave was previously granted have now changed. That is because the appellant is no longer exercising contact with J.
27. I do not accept Ms Harrington’s submission that Judge Page failed to consider this very point: he did. Having considered the evidence, Judge Page rejected the appellant’s claim that he had contact with J at her place of work the previous month (see para 18 of the determination). The last recorded supervised contact between J and the appellant was during the Christmas holiday (see para 17 of the determination). The appeal was heard on 4 June 2014. At para 14 Judge Page noted that the evidence: “gave the clear impression that he no longer had regular contact with her now she is an adult”, and at para 14 he concluded: “I am not satisfied that the appellant has a close relationship with [J] and I am not satisfied that he is seeing her on a regular basis.” At para 24 he noted that contact between the appellant and J “has become infrequent”.
28. Then, at para 32 Judge Page set out the circumstances leading to the grant of discretionary leave to the appellant up until J’s 18th birthday. Directly addressing the Secretary of State’s decision, Judge Page said:
- “The respondent in refusing noted that [J] was now aged 18 years and still residing with her foster carers. The appellant was refused discretionary leave to remain as he had not had contact with [J] for the past six months. There has been no evidence provided to show that the appellant did have contact with [J] for those six months.”
29. At para 34, Judge Page continued:
- “The evidence before me suggests that [J] has now moved on in her life and does not need the appellant in the United Kingdom The respondent has considered applying a policy of discretionary leave in refusing the appellant’s application.”
30. In my judgment, the Secretary of State did consider her “discretionary leave” policy and found consistently with the evidence, and the subsequent findings of Judge Page, that the policy did not apply as the circumstances leading to the previous grant of discretionary leave had changed, namely that the appellant was no longer maintaining contact with J.
31. For these reasons, the judge did not err in law. The Secretary of State considered and applied her ‘discretionary leave’ policy. Her decision was, therefore, in accordance with law.

2. Paragraph 276ADE

32. I turn now to Ms Harrington’s second submission that was, in effect, that the judge had misapplied para 276ADE(vi) of the Rules.

33. Ms Harrington accepted that by virtue of para A277C of the Rules that the Secretary of State was entitled to apply the new Rules in particular para 276ADE if he could not succeed under the 'discretionary leave' policy.
34. The appellant has, of course, only been in the UK since 2002 and, therefore, cannot take advantage of para 276ADE(iii) on the basis of twenty years' continuous residence in the UK.
35. The relevant provision is, therefore, para 276ADE(vi) which provides as follows:

"The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

.....

- (vi) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

36. Judge Page dealt with the issue of para 276ADE(vi) at paras 25-27 of his determination as follows:

"25. I now turn to the appellant's case that he is entitled to remain in the United Kingdom under paragraph 276ADE(vi) because he has no ties in Sierra Leone after having been here for twelve years. As I said above I am not persuaded by the appellant's evidence that he has no ties in Sierra Leone after twelve years in the United Kingdom. The appellant came to the United Kingdom when he was aged 35 years. At paragraph 15 of his witness statement he has given evidence that he had a 'good job' in Sierra Leone that he left in 2002. There he was a lecturer at the University of Sierra Leone and worked also as a social development officer in the Ministry of Social Welfare, Gender and Children's Affairs, Freetown. I find it unlikely that the appellant has severed all contact with his family and friends there, the country where he grew up and spent his formative years. In Sierra Leone he was very successful - and no doubt well respected. There would be no reason for him to lose all contact with friends and family there.

26. Further, the appellant said in his witness statement that he would have returned to his career in Sierra Leone had his adoptive daughter [J] not been taken away. In his witness statement he claimed to have been reluctant to remain in the UK, remaining only for the sake of [J]. He said (paragraph 17 of his witness statement) that so long as [J] remained in the UK, and remained in care, he feels he cannot leave the UK, so he must remain in the United Kingdom until she is old enough to decide whether to accompany him to Sierra Leone. If the appellant has been planning for this eventuality while in the UK it is irreconcilable to his claim that he has no ties to Sierra Leone after twelve years here.

27. For the above reasons I find that the appellant is not entitled to remain under paragraph 276ADE(vi) on the ground that he had no ties to Sierra Leone."

37. Ms Harrington placed reliance upon the Tribunal's decision in Ogundimu where at [123]-[125], the Upper Tribunal set out the proper approach to the issue of "ties" as follows:

"123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.

124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant's residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be 'unjustifiably harsh'.

125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members."

38. Ms Harrington relied upon the appellant's witness statement (at pages 1-4 of the appellant's bundle) dated 21 May 2014 at paras 11 *et seq* where, in effect, he stated that he had left his job as a lecturer in the University of Sierra Leone in 2002 and had remained in order to care for his daughter. Ms Harrington submitted that the appellant had not been cross-examined on his evidence and the judge had gone too far in speculating on whether he retained any ties in Sierra Leone.

39. I do not accept Ms Harrington's submission. The appellant clearly had an opportunity to give such evidence as he wished concerning his lack of continued connection with Sierra Leone and, to paraphrase Mr Richards' submission, his ability to reintegrate there if he returned. Judge Page had well in mind that the appellant had been in the UK for some twelve years. He also had in mind that the appellant was 35 when he came to the UK and had given up his job in 2002 in order to study in the UK but, given the

nature of a student visa, that could only have been on the basis of eventually returning to Sierra Leone. Indeed, the appellant's own evidence was that he intended to return to Sierra Leone but only remained in order to look after J and, as he said in para 17 of his witness statement:

"So long as my daughter remains in the UK, and remains in care, I do not feel I can leave this country. I cannot abandon her. I see no other way out but to remain until she is old enough to decide whether to accompany me to Sierra Leone once more."

40. The appellant's own evidence was, therefore, that he would remain until she was old enough to return to Sierra Leone with him. That evidence does not raise the inference that he had no continuing connection with Sierra Leone to which he intends to return when J is old enough to do so with him.
41. In my judgment, Judge Page was entitled to conclude that the appellant had not established, looking at all the evidence, that he had lost all ties with Sierra Leone despite his absence for twelve years. Nothing in the appellant's own evidence suggests that he had lost all ties given his intention of returning. The Judge did not misdirect himself as to the requirement in para 276ADE(v) and his finding was not irrational on the evidence. The Judge did not err in law in finding that the appellant could not meet the requirements of para 276ADE(vi).

3. Article 8

42. Turning to Ms Harrington's third submission, this concerned the judge's finding that there were no "compelling circumstances" sufficient to justify the grant of leave outside the Rules.
43. I did not understand Ms Harrington to submit that Judge Page adopted the wrong approach to considering Art 8 outside the Rules. It is clear to me that he correctly, in the light of the fact that the appellant could not meet any requirements of the Rules, directed himself that only if there were "compelling circumstances" would a breach of Art 8 be established. That follows from the case law including MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and R (Nagre) v SSHD [2013] EWHC 720 (Admin) and, the decision of the Upper Tribunal, to which Judge Page referred, in Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC).
44. Instead, Ms Harrington submitted that the judge had fallen into error in assessing whether there were "compelling circumstances".
45. First, Ms Harrington submitted that the judge had failed to take into account that but for the conduct of his previous legal representative, the appellant would have had discretionary leave from 2006 to 2013 continuously. She submitted that the break between September 2006 and August 2010 was due to failures by the appellant's previous legal representatives ("DMS"). They had failed to remain in contact with the appellant and as a result an application for discretionary leave was not

made which would have been granted and would have resulted in the appellant after six years being granted indefinite leave to remain.

46. Judge Page dealt with this issue at paras 29-31 of his determination as follows:

“29. Ms Delgado, the appellant’s solicitor, asked that weight be given to her argument that had it not been for alleged neglect by the appellant’s solicitors [DMS], the appellant could have sought and obtained indefinite leave to remain in 2012. All of these factors she argued should lead to the appellant being allowed to remain in the United Kingdom outside of the Rules. She complained that the respondent should have been granted discretionary leave to remain for the first time prior to 9 July 2012 and had his application been considered under the Home Office policy instruction on discretionary leave he would have succeeded.

30. I have considered the appellant’s complaint against his former solicitors DMS and the findings. Even if I could be satisfied that the appellant lost an opportunity to apply for indefinite leave to remain, the claimed consequences of that are too remote to be arguable as a compelling circumstance for leave to remain to be granted outside the Rules. It is not certain that any missed application would have been granted. But I am not satisfied that the appellant’s complaint against DMS has any real substance.

31. The appellant complained to the Legal Complaints Service about the conduct of DMS after his file had been passed to them by [RWT] Solicitors when they advised the appellant they were no longer doing publicly funded work. The response to the appellant’s complaint by the Legal Complaints Service dated 19 March 2008 at page 69 of the appellant’s bundle found that the appellant’s complaint against DMS was unfounded. Its finding included that the appellant had not given instructions to DMS and not made contact with them once he learned that his file had been passed to them by [RWT] Solicitors. DMS wrote to the appellant in April 2006 asking him to arrange to attend their office but he never did. I am not satisfied that DMS failed the appellant, losing him an opportunity to obtain indefinite leave to remain in the United Kingdom to pursue contact with [J].”

47. Ms Harrington submitted that, although the complaint against DMS was not upheld, nevertheless the firm had been criticised for not informing the appellant when they received the Home Office decision and the appellant’s passport soon after the file was passed to them by an earlier firm representing the appellant. Ms Harrington drew my attention to the letter from the “Legal Complaints Service” dated 19 March 2008 at page 69 of the bundle and in particular at page 71.

48. It seems to me that this is a weak point. The criticism of DMS is that when the file was transferred to them in July 2006 followed shortly thereafter by the Home Office’s decision to grant the appellant six months’ leave until 30 September 2006 together with the return of the appellant’s passport, DMS failed to pass on to the appellant the Home Office decision and passport, which would have been “prudent”, and thereby prejudiced the appellant as he did not seek discretionary leave earlier such that there would be no break in the continuity of his leave between 30 September

2006 and 25 August 2010. There are, in my judgment, a number of flaws in that argument. First, as Judge Page pointed out in para 31 the appellant was himself at fault in failing to respond to invitations by DMS to attend their offices. Secondly, it would appear that DMS advised the appellant and returned his passport on 28 November 2006 (see page 71 of the bundle). Nevertheless, the appellant did not make an application for further leave outside the Rules on a discretionary basis until 12 November 2008, some two years later. It is impossible to see how any delay by DMS in advising the appellant or returning his passport had any significant effect or prejudice upon the appellant seeking (and on Ms Harrington's submission being granted) discretionary leave at an earlier date. I therefore reject Ms Harrington's submission that Judge Page erred in law by failing to take this matter fully into account.

49. Secondly, in relation to Art 8, Ms Harrington submitted that Judge Page had failed to take into account the strength of the appellant's private life and his positive impact on the community. Ms Harrington relied upon the unchallenged witness statements at pages 5-20 of the appeal bundle.
50. Those statements, together with that of the appellant, set out his employment and refer to his engagement in church activities and other community contributions. Dr Hintjens, for example, states that the appellant: "Has strong networks in UK through church, through his volunteering work, and through the personal ties he has with people of all walks of life in Swansea".
51. I accept that Judge Page did not make specific reference to this evidence although he refers to the bundle of documents and a petition signed by 24 people handed up at the hearing at para 3 of his determination.
52. In UE (Nigeria) v SSHD [2010] EWCA Civ 975, the Court of Appeal accepted that "contribution to the community" although not a freestanding or stand-alone factor relevant under Art 8 was relevant in assessing the "public interest" in maintaining effective immigration control or in establishing a "private life" claim in the UK.
53. In UE, Sir David Keene commented at [35] that:

"The loss of such public benefit (namely a positive contribution to the community) is capable of being a relevant consideration when assessing the public interest side of proportionality under Article 8 ..."
54. However, at [36], Sir David Keene went on to emphasise the limits of such a factor:

".... while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant"
55. The evidence here was not, in my judgment, particularly strong concerning contributions to the community above and beyond that which

might normally be expected of an individual living a life in the UK. In my judgment, the appellant's "contribution" was not a significant factor relevant to his private life claim under Art 8.

56. In my judgment, the judge had well in mind the appellant's basis for being in the UK since 2002 as a student (see para 35). His private life claim was primarily based upon his desire to maintain contact with his, now adult, daughter, J. That, however, as Judge Page found, was no longer the situation. Once that fell away, the essence of the appellant's claim was that he had been in the UK since 2002 having come to the UK on a temporary basis, namely as a student, and had no basis under the Rules or legitimate expectation to remain any longer. The strength of his private life claim was not significantly enhanced by the evidence of his work and community involvement whilst living in the UK. Judge Page's finding that there were no "compelling circumstances" so as to outweigh the public interest reflected in the appellant's inability to demonstrate any lawful basis for being in the UK was not only open to the judge but was, in my judgment, inevitable. I see no proper basis for interfering with the judge's conclusion that the appellant could not succeed in establishing that he was entitled to leave outside the Rules under Art 8 of the ECHR.

Decision

57. For all these reasons, the decision of Judge Page to dismiss the appellant's appeal on all grounds did not involve the making of an error of law. That decision stands.

Signed

A Grubb
Judge of the Upper Tribunal
14 October 2014

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal
14 October 2014