



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/14768/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 17 June 2014

Determination Promulgated
On 30 June 2014

Before

Deputy Upper Tribunal Judge Pickup
Between

Secretary of State for the Home Department

and

Temilade Tejumade Oluwatuyi
[No anonymity direction made]

Appellant

Claimant

Representation:

For the claimant: Mr B Chimpango

For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimant, Temilade Tejumade Oluwatuyi, date of birth 5.7.77, is a citizen of Nigeria.
2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Bruce, who allowed her appeal against the decision of the respondent, dated 19.4.13, to refuse entry clearance to the United Kingdom as a

partner, pursuant to Appendix FM of the Immigration Rules. The Judge heard the appeal on 1.4.14.

3. First-tier Tribunal Judge Davey granted permission to appeal on 29.4.14.
4. Thus the matter came before me on 17.6.14 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Bruce should be set aside.
6. I note that there is no cross appeal against the First-tier Tribunal's dismissal of the appeal on immigration grounds. In the circumstances that decision must stand. The respondent appeals against the judge's decision in relation to human rights.
7. The relevant background can be summarised as follows. The appellant came to the UK as a visitor but overstayed and worked illegally. Following conviction and sentence in 2005 to 12 months imprisonment for obtaining a pecuniary advantage by deception the appellant was removed to Nigeria. In 2009 she applied to return as the spouse of Mr Olubunmi Oluwatuyi, a British citizen, but was refused on the grounds that exclusion was conducive to the public good and her appeal dismissed in 2010 by Judge Herwald. There was no appeal against that determination, which found that the appellant had a serious criminal record and that it would be undesirable to grant her entry clearance.
8. The application the subject of the present appeal was made on 14.1.13 and refused on 31.5.13 on the basis that her conviction is not spent and thus her application has to be refused under Appendix FM and it was undesirable to grant entry on compassionate grounds, because of her character and conduct. There were also other failures to comply with the requirements of Appendix FM. The Entry Clearance Manager also raised the issue as to whether there was a genuine and subsisting relationship.
9. Judge Bruce correctly found that the appeal could not succeed under Appendix FM because, as explained at §8 of the determination, the appellant does not meet the suitability requirements of section S-EC, because a period of 10 years had not elapsed since the end of her sentence. In such circumstances, "unless refusal would be contrary to (ECHR and Refugee Convention), it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."
10. At §10, although she disagreed with the conclusion, Judge Bruce found that she was bound by the unappealed findings of Judge Herwald that the appellant had a serious criminal record and that it would be undesirable to grant her entry clearance. There was no evidence to justify departing from that finding and thus judge Bruce concluded that the appellant fell foul of the ground of refusal under S-EC 1.5.

11. I'm not sure I understand Judge Bruce's remarks at §10, where she stated that she would have no hesitation in reaching a different conclusion from Judge Herwald. However, whether S-EC 1.4 or S-EC 1.5 applies, the effect is the same, that the application has to be refused under Appendix FM. The application could not succeed under other provisions of Appendix FM because section S-EC is a mandatory ground for refusal of entry clearance.
12. Judge Bruce then proceeded to consider whether the appellant's and her husband's circumstances in relation to human rights justified allowing entry clearance to the UK as a partner, despite inability to comply with section S-EC.
13. Judge Bruce found that the marriage was genuine and subsisting and that the parties intended to live together. She also found that there was family life between the appellant and his wife and that the refusal to grant entry clearance was a very serious interference with that family life. In essence, Judge Bruce went through the Razgar steps and reached the eventual conclusion that she would have allowed an application to revoke a deportation order and that the decision was unjustifiably harsh. Having dismissed the appeal on immigration grounds, the judge allowed the appeal on human rights grounds.
14. In granting permission to appeal, Judge Davey noted that the grounds raise arguable errors of law in the assessment of relevant factors in the article 8 ECHR proportionality assessment and in relation to the public interest remarks at §14 of the determination.
15. I disagree with Judge Davey's statement at §3 that grounds 5 and 6 were unlikely to succeed "because notwithstanding Gulshan and Nagre, article 8 outside of the Immigration Rules falls to be considered under European case law and as demonstrated by Huang [2007] UKHL 11 and MF (Nigeria) [2013] EWCA Civ 1192." That is not an accurate statement of the current case law. It is no longer good law that there must be a two-stage process, first under the Immigration Rules and then under article 8 ECHR on the basis of Razgar.
16. Having found the appellant did not meet the requirements of the Immigration Rules for leave to remain, Judge Bruce should have considered whether the appellant's circumstances might arguably be sufficiently compelling and insufficiently recognised within the Immigration Rules so as to justify granting the application outside the Immigration Rules on the basis of article 8, as the decision of the Secretary of State produces a result that is unjustifiably harsh. Whilst Judge Bruce did find the decision to be in her view "unjustifiably harsh," she appeared to have done so under a Razgar consideration of article 8 outside the Immigration Rules, without consideration of the current case law setting out what must take place before that stage can be embarked upon.
17. In MF (Nigeria) v SSHD [2013] EWCA Civ 1192, the Court of Appeal held that in relation to deportation cases the 'new' Immigration Rules are a complete code but involve the application of a proportionality test. Whether that is done within the new rules or outside the new rules as part of the article 8 general law was described as a

sterile question, as either way the result should be the same; what matters is that proportionality balancing exercise is required to be carried out. In other words, a proportionality test is required whether under the new rules or article 8. MF (Nigeria) was followed in Kabia (MF: para 398 - "exceptional circumstances") 2013 UKUT 00569 (IAC).

18. In Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) the Upper Tribunal set out, inter alia, that on the current state of the authorities:
 - (b) after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin);
 - (c) the term “insurmountable obstacles” in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre.
19. The case also explained that the Secretary of State addressed the Article 8 family aspects of the respondent’s position through the Rules, in particular EX1, and the private life aspects through paragraph 276ADE. Only if there were arguably good grounds for granting leave to remain outside the rules was it necessary for him for Article 8 purposes to go on to consider whether there were compelling circumstances not sufficiently recognised under the Rules.
20. More recently, in Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC), the Upper Tribunal held:
 - (i) Failure on the part of the Secretary of State to identify in her decision any legitimate aim under Article 8(2) of the ECHR does not prevent a court or tribunal from seeking to do so on the basis of the materials before it.
 - (ii) “Maintenance of effective immigration control” whilst not as such a legitimate aim under Article 8(2) of the ECHR can normally be assumed to be either an aspect of “prevention of disorder or crime” or an aspect of “economic well-being of the country” or both.
 - (iii) “[P]revention of disorder or crime” is normally a legitimate aim both in expulsion cases where there has been criminal conduct on the part of the claimant and in expulsion cases where there have only been breaches of immigration law.
 - (iv) MF (Nigeria) [2013] EWCA Civ 1192 held that the new immigration rules regarding deportation of a foreign criminal are a complete code. This was because of the express requirement in them at paragraph 398 to have regard to exceptional circumstances and other factors.
 - (v) It follows from this that any other rule which has a similar provision will also constitute a complete code;

- (vi) Where an area of the rules does not have such an express mechanism, the approach in R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) ([29]-[31] in particular) and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) should be followed: i.e. after applying the requirements of the rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them.
21. The provisions of Appendix FM are the Secretary of State’s response to private and family life and are intended to be a complete code. Applying the above guidance and case authority, the judge should have identified the compelling circumstances insufficiently recognised in the Immigration Rules so as to justify considering article 8 outside the Rules. I accept that some of the factors set out by Judge Bruce, particularly in §15 and §16 could be deployed to support compelling circumstances, but those factors were in fact being relied on in a proportionality assessment. In other words, the judge went straight to the article 8 assessment.
 22. Even if Judge Bruce was justified in proceeding to an article 8 assessment, I also find an error of law in §14 of the determination, where as part of the Razgar considerations, the judge notes that the aim pursued by the Secretary of State is the protection of the economy through the maintenance of effective immigration control and stated, “there is absolutely no evidential basis for suggesting that it is to prevent crime and disorder.” However, the very basis of the suitability requirements of S-EC 1.4 & 1.5 is the protection of the public, a legitimate aim which case law indicates carries a higher weight in the proportionality assessment than the economic well-being of the state. Both S-EC 1.4 and 1.5 specifically refer to exclusion being conducive to the public good, which was also the finding of the previous determination of Judge Herwald. It follows that in considering only the economic well-being of the UK, the proportionality assessment was necessarily flawed.
 23. Further, rather more minor but nevertheless significant, factors were left out of the proportionality assessment, including considerations as to maintenance and accommodation, both of which were raised in the refusal decision. These requirements of Appendix FM would have had to be complied with even if the appellant was not stymied by the suitability requirements. These should have been brought into account in any proportionality assessment.
 24. In the circumstances, I find errors of law in the making of the decision of the First-tier Tribunal such that the decision in relation to human rights should be set aside and remade. I indicated this finding to the parties at the hearing before me and then heard their further submissions on the remaking of the decision.
 25. Mr Chimpango submitted that there were in this case exception and compelling circumstances rendering the decision unjustifiably harsh. He highlighted those factors set out by Judge Bruce and in particular relied on the difficulties in travelling to and residing in Nigeria as a British citizen with multiple and serious health issues. He submitted that there were more factors in favour of allowing the appellant to join her husband in the UK than to prevent her from doing so. The sponsor works for the

Home Office and is established in the UK with disability allowance and an income upwards of £20,000.

26. In considering whether the appellant and/or the sponsor's circumstances are compelling and insufficiently recognised in the Immigration Rules that leave to enter should, exceptionally, be granted outside the Immigration Rules on the basis of family life under article 8 ECHR, I take into account that because the appellant fails at the suitability requirements, no consideration of exception EX1 and insurmountable obstacles has taken place. However, the Secretary of State considered whether entry clearance should be granted on compassionate grounds but in the light of her character and conduct it was found to be undesirable to grant entry clearance.
27. As the "mechanism" referred to in Shahzad is not available under the Immigration Rules, I take the approach that, "only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them."
28. I take into account those factors already set out by Judge Bruce and adopt her finding that this is a genuine and subsisting marriage and that they wish and intend to live together in the UK. However, I have to bear in mind the public interest that the exclusion of the appellant has been deemed to be conducive to the public good and that there has been an unchallenged previous determination to that effect. That determination also found the appellant to be "without doubt, a liar, a cheat and a dishonest woman" and that it would be undesirable to grant her entry clearance to the UK. The appellant was removed from the UK because of her criminal conduct and normally may not apply to re enter until 10 years have elapsed from end of her sentence (not just the release date). I take into account that this public interest carries a higher weight than the normal consideration of protection of economic well-being.
29. I have to take into account as a significant factor that the appellant has not been able to comply with the Immigration Rules for entry as a partner.
30. I also have to take into account that the relationship was entered into after the appellant had been removed from the UK in 2006. They were married in Nigeria in 2009 at a time when they should have been aware that it would be very difficult for the appellant to be permitted to return to the UK for some time to come, because of her criminal conviction and removal. They were apparently willing to continue the relationship, with the sponsor visiting the appellant in Nigeria. Her application for entry in 2009 was refused because she failed to declare her unspent conviction.
31. I take into account that Mr Oluwatuyi's health conditions would make it difficult for him to settle in Nigeria. He has obstructive sleep apnoea syndrome, hypertension and breathing difficulties requiring the use of oxygen at night and personal care and assistance. However, he has been able to maintain his employment and has managed each year to visit the appellant in Nigeria, staying for approximately one month. I also note that there are generators available to ensure that if the electricity supply

failed his oxygen supply would continue. These are difficulties and may be hardships, but not ones that cannot reasonably be overcome, if the sponsor wishes to continue family life with the appellant. Otherwise, the sponsor would not have been able to visit the appellant on a regular basis, which he is able to continue doing. In the circumstances, I am not satisfied that the circumstances of the appellant and her husband can properly be described as compelling.

32. It is illustrative that in Gulshan the Upper Tribunal considered that it was not unduly harsh for a husband who originated from Pakistan but was now a British national, to return to Pakistan with his wife who was seeking leave to remain as his spouse. The panel acknowledged that the couple would suffer some hardship, as he had been in the UK since 2002, he had worked here and was receiving a pension, and housing benefit and other state benefits, some of which could not be transferred to Pakistan.
33. Considering all the evidence in the round, as a whole, and for the reasons stated, I am not satisfied that there are in this case compelling circumstances insufficiently recognised in the Immigration Rules that justify, exceptionally, allowing this appeal outside the Immigration Rules under article 8 ECHR on the basis that the decision is unjustifiably harsh.

Conclusions:

34. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision, preserving the findings in relation to the Immigration Rules.

I re-make the decision in the appeal by dismissing it on all grounds.



Signed:

Date: 27 June 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: the appeal has been dismissed.

A handwritten signature in black ink, appearing to read 'J. Pickup', written over a faint circular stamp.

Signed:

Date: 27 June 2014

Deputy Upper Tribunal Judge Pickup