



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

Appeal Number: IA/45474/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 October 2015**

**Determination Promulgated
On 3 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OHO

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms N. Willocks-Briscoe, Senior Home Office Presenting Officer

For the Respondent: Mr Z. Malik, instructed by Alpha Rocks Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of OHO, a citizen of Nigeria against the respondent's decision to refuse his application for leave to remain in the UK.
2. For the purposes of this decision I refer to the parties as they were in the First-tier Tribunal.

3. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make no anonymity order.

Background

4. The appellant is a citizen of Nigeria born on 24 April 1974. He entered the United Kingdom in March 2001 and was granted an extension as the family member of an EEA national until 16 August 2008. That marriage broke down with the divorce becoming absolute on 21 October 2008. The appellant made a number of applications and appeals thereafter becoming appeals rights exhausted on 4 June 2010. He made an application in relation to Article 8 of the Human Rights Act on 5 July 2010. Although this application was initially refused with no right of appeal, a further reconsideration resulted in the appellant being issued with a decision dated 22 October 2014 to remove the appellant under section 10 of the Immigration and Asylum Act 1999.
5. The appeal against that decision came before First-tier Tribunal Judge O'Malley on 11 May 2015. The judge, in a decision promulgated on 28 May 2015, dismissed the appeal under the Immigration Rules and under the EEA Regulations, but allowed the appeal under Article 8 outside the Immigration Rules, in relation to family life.
6. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that, firstly, there was a material error of law and contradictory findings in the judge's finding of dependency on the appellant by his brother. The second ground was that the judge's approach to Section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) was flawed and that the judge had failed to consider AM (s117B) Malawi [2015] UKUT 0260 (IAC).
7. The appeal came before me. Ms Willocks-Briscoe relied on the grounds of appeal and submitted that the judge had made contradictory findings when looking at the evidence. She submitted that the findings indicated the predominance of the appellant's brother's care was provided by the state. She indicated that the letters in support of the appellant numbering over forty pages in the bundle made no reference to the appellant's support of his brother, notwithstanding the medical evidence before the Tribunal. In relation to the second ground Ms Willocks-Briscoe submitted that the judge had failed to consider all the relevant factors including the fact that the appellant did not meet the immigration rules and had incorrectly attached positive weight to other factors. It was incumbent on the judge to take into consideration all the relevant factors in section 117B.
8. Mr Malik submitted in relation to ground 1 that the question of whether there is family life is a question of fact, not law and that this was a matter for the First-tier to decide. The respondent could only succeed

if they demonstrated that the finding was perverse and it was impossible for them to do so.

9. As regards the second ground Mr Malik argued that in paragraph [63] the judge had addressed proportionality and had in mind the weight to be attached to the public interest. In relation to the judge's findings at paragraph [65] that the appellant could speak English and had been no burden to the tax payer he was obliged to have regard to those factors but did not allow the appeal on those factors. It was Mr Malik's case that the judge did not put these factors in the balance in favour of the appellant but was rather noting that they did not add weight to the public interest. In relation to the respondent's argument that the judge had not properly applied Nasim and Others (Article 8) [2014] UKUT 25 and [2013] UKSC 72, Patel and Others v SSHD Mr Malik asserted that these had no relevance as they related to family life and this case was allowed solely on family life.

Ground 1 - Family Life

10. Although Ms Willocks-Briscoe sought to persuade me that the judge's findings on the ties between the appellant and his brother were contradictory, I do not find this to be the case. She submitted that the judge had initially found that there were no ties and then later on in the decision found a close bond. However she was unable to point to any finding that there were 'no ties'. Although she relied on paragraph 48 of the decision the judge's findings here were as follows:

'The appellant does support his brother and I accept that evidence. I find that the personal care is intermittent, as there is a care package in place and I find that the appellant has other tasks and commitments to occupy his time'

This was not a finding of 'no ties' but rather that the appellant's personal care of his brother was intermittent as there is a care package in place for his brother. However the fact that the judge found that the appellant did not provide all of his brother's personal care, is not inconsistent with his findings of additional levels of dependency, including in the same paragraph that the appellant 'does support his brother.'

11. At paragraph [56] the judge properly directed himself that in order to engage Article 8, in relationships between adults, there had to be 'evidence of further elements of dependency, involving more than the normal emotional ties'. A fact sensitive approach is required: Singh & Another v The Secretary of State for the Home Department [2015] EWCA Civ 6.
12. At paragraph [57] the judge went on to find that the appellant's case had the additional elements of dependency present and that there was a family life in the UK:

'I note and accept that the appellant provides support, both practical and medical, to his brother and that his brother's physical and mental health is supported by the presence of the appellant. In addition I find that the appellant is given support by the presence and relationship with his brother'.

I also note that at paragraph [51] the judge found that the appellant's departure would cause hardship.

13. At paragraph [62] the judge found that:

'... the appellant's brother accepts care from a range of carers who attend 3 times a day and find that he would accept additional care, if needed, from other carers if the appellant were not present'.

Again this finding is not inconsistent with a finding of dependency; to suggest that it is, is to equate personal care in itself with dependency. In addition I do not share Ms Willocks-Briscoe's view that the judge's finding that the appellant's brother receives visits from state carers three times a day is equivalent to the state providing a 'predominance' of care (and I note that the appellant's evidence as recorded by the judge - and as indicated above the judge at paragraph 48 accepted the appellant's evidence that he supported his brother - was that the appellant 'is there overnight and can give him his drugs and carry him to his bed.')

14. The judge's findings must be considered in their entirety. The judge clearly looked (including in his findings at paragraph [57] as set out in paragraph 12 of this decision) at all elements of the relationship between the appellant and his brother, which includes in part, but which the findings clearly set out was not exclusively limited to, a personal care element.

15. I am satisfied therefore that the judge reached a conclusion open to the judge on the evidence before and gave detailed, adequate reasons for those findings. I do not find any merit in this ground.

Ground 2 - Approach to Section 117B

16. In relation to ground 2, the judge at paragraphs 8 to 17 of the determination set out the applicable law, including setting out in full at paragraphs 16 and 17 the provisions of section 117B of the 2002 Act. The judge at paragraphs 63 and 64 recorded a finding of significant weight to be attached to the maintenance of immigration control.

17. Although the respondent has argued that the judge, contrary to the guidance in AM (s117B) Malawi (above), attached positive weight to the non-receipt of public funds and that the appellant spoke English, the judge was 'having regard' to these factors and making findings on them as the judge was required to do. I am not satisfied that the judge was according positive weight to these factors, which would

have been incorrect. When looked at as a whole, paragraphs 63 to paragraph 67 considered generally the factors in favour of the public interest, including considering at paragraph 65, section 117B. Within those findings the judge, quite properly, considered and made findings on the elements of section 117B. The fact that the judge found that those factors did not count against the appellant and towards the public interest, does not constitute an improper finding of positive weight.

18. In relation to the issue of the appellant having used the NHS, the public interest consideration at section 117B(3) states that it is in the public interest that persons seeking to enter or remain in the UK are 'financially independent'. There is no requirement that such financial independence constitutes an absence of recourse to the NHS. Therefore the judge did not err in not including this in the section 117B consideration.
19. Considered in its entirety the judge's findings on section 117B were findings that were properly open to the judge and did not include irrelevant factors nor fail to consider relevant factors.
20. In relation to the judge's finding, outside of the section 117B remit, that the appellant had no criminal convictions, the judge included this finding in the context of the findings under section 117B in relation to the public interest, although this is not one of the factors listed in that section. Even if this constituted an error, it is not material, as there was no positive weight attached to this finding. The judge at paragraph 59 had already found that the appellant's private life did not engage Article 8 and was therefore making findings exclusively in relation to family life.
21. When considered as a whole the judge made findings that were open to the judge on the evidence. The second ground of appeal therefore has no merit.

Decision:

22. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall stand.

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Dated: 28 October 2015

Deputy Upper Tribunal Judge Hutchinson