



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/20147/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated**

Reasons

On 14 October 2015

On 11 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAMES CHINEDU EDEH

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Duffy, Home Office Presenting Officer

For the Respondent: Mr A Jafar, Counsel, instructed by Graceland Solicitors

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department (hereafter “the Secretary of State”) against the decision of First-tier Tribunal Judge Griffith (hereafter “the judge”). On 12 May 2015 the judge allowed the appeal of Mr Edeh (hereafter “the claimant”)

against a decision dated 3 April 2014 giving directions for his removal under section 10 of the Immigration and Asylum Act 1999.

2. The claimant came to the UK on 13 September 2000 with entry clearance conferring leave to enter as a visitor. On 21 January 2003 he made an out of time application for leave to remain as a spouse and a period of discretionary leave was granted from 3 November 2005 until 2 November 2008. Leave to remain was subsequently extended to 8 September 2012. On 21 December 2013 the claimant made an application for Indefinite Leave to Remain (“ILR”). That application was refused and was the subject matter of appeal before the First-tier Tribunal.
3. Before the First-tier Tribunal the claimant argued that he was entitled to ILR because he had accrued six years’ of continuous residence with discretionary leave in accordance with the Secretary of State’s policy. Further, the claimant argued that he met the requirements for leave on private life grounds pursuant to paragraph 276ADE, and that removal infringed his human rights contrary to Article 8 of the ECHR.
4. The judge found the claimant could not benefit from the Secretary of State’s policy because she was not satisfied that: (i) the claimant had accrued six years’ continuous residence with discretionary leave to remain and, (ii) his marriage which was the subject matter of that grant was no longer subsisting [26 to 28]. The judge proceeded to consider paragraph 276ADE of the Rules. She referred to the fact that the claimant maintained contact with his family in Nigeria but concluded that those ties were not sufficient to defeat paragraph 276ADE(vi) when: (i) the claimant had established significant ties to the UK over a fifteen year period of residence; (ii) in respect of his marriage, there may be a prospect of reconciliation and, (iii) he was working until April 2014 contributing to the economy and had gained some qualifications. The judge noted the claimant’s father and siblings were in Nigeria but he had not visited that country for six years’ and there was no evidence that any of his family would be willing to offer support were he to return [31]. The judge was thus satisfied that the claimant met the requirements of the relevant Rule.
5. In the alternative, the judge considered Article 8 outside of the Rules. She found that Article 8 was engaged and answered the third and fourth questions posed in **Razgar [2004] UKHK 27** in the affirmative [33]. The issue was thus confined to that of proportionality. The judge had regard to the public interest considerations set out in s.117B of the Nationality Immigration and

Asylum Act 2002 (as amended) (hereafter “the 2002 Act”) and noted that the claimant could speak English and until he was dismissed from his employment was financially independent. She made reference to the claimant’s previous grants of leave on the basis of marriage and concluded in light of the above that the public interest considerations did not prevail in this case [34]. Accordingly, the appeal was allowed under the Immigration Rules and on human rights grounds.

6. The Secretary of State lodged an appeal. Her pleaded case stated that it was not clear why the judge was satisfied that the Immigration Rules were met and she failed to identify any “very significant obstacles” to integration in Nigeria. Further, it was argued that the judge gave inadequate reasons for finding that the public interest considerations were outweighed if the claimant was removed to Nigeria. First-tier Tribunal Judge Page found those grounds arguable and granted permission on 16 July 2015.
7. The matter came before me to determine whether the judge erred in law.

Submissions

8. On behalf of the respondent Mr Duffy submitted that the judge materially erred in law. In amplifying the grounds he stated that the judge failed to consider whether there were significant obstacles to the claimant’s integration. He submitted that the question of what ties the claimant had retained to Nigeria was a consideration but not the sole consideration. He submitted that there had been no adequate consideration of Article 8 of the ECHR.
9. Mr Jafar relied on his Skeleton Argument and submitted that the “no ties” threshold under the Rules was a higher test to the “significant obstacles test”. He submitted that the Secretary of State was advancing a disagreement with the decision. No grounds of perversity or irrationality had been alleged. He submitted the judge’s conclusions were open to her on the evidence and that sufficient reasons had been given. He submitted the judge correctly directed herself in respect of s.117A-B of the 2002 Act. He submitted that even if the judge had failed to consider the significant obstacles test, that the error was not material as the change in the Rules gave rise to a test carrying a lower threshold than its predecessor.
10. In reply Mr Duffy did not accept that the significant obstacles test was a lower test. He accepted the test was of a similar nature but it

required the claimant to show what obstacles prevailed. He submitted that the question of ties was a consideration but not a fait accompli. He submitted the judge failed to provide reasons for concluding that the decision was disproportionate. He stated that paragraph 33 was a statement of the law and paragraph 34 considered s. 117B of the 2002 Act, but the judge made no findings as to whether the claimant was financially independent. He referred to **AM (S 117B) Malawi [2015] UKUT 0260 (IAC)** and submitted that the judge's reasons in respect of Article 8 were not sufficient.

Decision on Error of Law

11. I am satisfied that the decision of the First-tier Tribunal involved the making of errors of law such that it has to be set aside.
12. Notwithstanding the efforts of Mr Jafar to persuade me otherwise, I am satisfied that there are difficulties in the judge's approach to the issues in this case. The claimant appealed to the First-tier Tribunal against a decision of the Secretary of State dated 3 April 2014. The refusal letter determined that the claimant failed to satisfy the requirements set out in paragraph 276ADE(1)(vi) of the Rules, those being the requirements to be met by an applicant for leave to remain on the grounds of private life. The Rules in force at the date of his application and at the date of the refusal letter provided as follows:

"1. 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) subject to sub-paragraph (ii), is aged 18 years or above, has lived continuously in the UK for less than 20 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."
13. That was the Rule which the Secretary of State determined the claimant failed to satisfy.
14. The judge's consideration of this Rule is limited to two short paragraphs : see [31 & 32]. Therein the judge found the claimant had resided in the UK for fifteen years. He was married to a British citizen and whilst he was estranged from his wife there remained a possibility for reconciliation. He had through work contributed to the economy until April 2014 and gained some qualifications. He had a father, brothers and sisters in Nigeria but he had been absent from than country for six years', and there was no evidence that any family member would offer support on the claimant's return. He had established significant ties to the UK. The judge was thus satisfied that the requirements of the Rule were met.

15. In reaching that conclusion the judge recognised that the above version of the Rule was changed on 28 July 2014 which replaced the test of “no ties” with a test of “very significant obstacles” to integration. Although the explanatory statement to the Statement of Changes in the Immigration Rules states that the new wording represents a clarification of the original policy intention, rather than a substantive change, it seems to me that the test of “no ties” is different from the test of “very significant obstacles”. To hold otherwise would mean that the Rule change would be otiose - a distinction without a difference. I am satisfied that the judge considered the correct test which is that which applied at the date of application which accords with the introductory wording of the Rule. The same version of the Rule applied at the date of decision which was the subject of the appeal before the judge albeit a new version had been introduced by the time of the hearing before the First-tier Tribunal. I do not consider that the new version of the Rule should inform the “no ties” test which was there in the Rules before the July 2014 amendments because of the difference in wording and substance. Whilst the judge therefore applied the correct test, her approach to its application was flawed.

16. In **Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 00042 (IAC)** the Upper Tribunal concluded inter alia that:

"The requirement set out in paragraph 276ADE (vi) (in force from 9 July 2012 to 27 July 2014) to show that a person "is aged 18 years or above, has lived continuously in the UK for less than 20 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", requires a rounded assessment as to whether a person's familial ties could result in support to him in the event of his return, an assessment taking into account both subjective and objective considerations and also consideration of what lies within the choice of a claimant to achieve."

17. Whilst the judge observed that she was required to make a rounded assessment of all the relevant circumstances, I am not satisfied that she achieved this as her findings [set out in para. 14 above] are essentially restricted to subjective considerations. I consider that on the facts of this case more was required from the judge to make it clear that she had had regard to all relevant considerations including an objective consideration which in this case is wholly lacking. For instance, the judge noted that the claimant has family in Nigeria with whom he remains in contact and between 2006 and 2009 he made six visits to the country. The judge noted that there was no evidence that would indicate whether any family member would be able to offer support to the claimant on return, but that observation upon which she attached some weight reversed the burden of proof. It was for the claimant to establish that no support would be available on

return, and the lack of such evidence did not mean that that was the case objectively.

18. Further, the judge's finding that the claimant's familial ties to Nigeria are not sufficient to defeat the Rule when other factors are considered is not sufficiently reasoned [32]. The judge appears to base this finding on her conclusion that the claimant has "established significant ties to the UK", but she fails to identify the nature of those ties. The judge's findings at [31] do not adequately reason in my view the nature of the ties she found so significant. I am thus satisfied that the judge's decision under the Rules is deficient in its reasons and cannot stand.
19. The judge considered Article 8 in the alternative. In this regard the judge's consideration is also vitiated by legal error. The issue boiled down to the question of proportionality. The judge had regard to the fact that the claimant speaks English and that he was until April 2014 financially independent. She referred to the fact that there was no evidence that the claimant was in receipt of public funds and made reference to previous grants of leave on the basis of his marriage [34]. The judge thus concluded that removal was disproportionate.
20. Firstly, the judge's reasoning is very brief and does not adequately address the issue of exceptional circumstances. Secondly, I am satisfied that the judge has not given proper consideration to s.117B of the 2002 Act. Whilst the judge noted the claimant speaks English she was also required to have regard to the claimant's financial circumstances. Whilst she noted the claimant was hitherto financially independent, at the date of hearing, there was no evidence that he was financially independent. The fact that there was no evidence indicating that he was in receipt of benefits did not on balance determine the question of financial independence. The judge further failed to take into account the guidance given in the case of **AM (Malawi)** (supra), in that the claimant could not on account of such factors obtain a positive right to a grant of leave to remain. I am thus further satisfied that the judge's decision contrary to Article 8 is deficient in its reasons and cannot stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. The decision of the First-tier Tribunal is set aside. Having considered the submissions of the parties, I find that the appropriate course in this case is for the matter to be remitted for hearing afresh by the First-tier Tribunal by a judge other than Judge Griffith.

No anonymity direction is made.

Signed:

Date:

Deputy Upper Tribunal Judge Bagral