



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

Appeal Number: HU/06920/2015

THE IMMIGRATION ACTS

**Heard at Birmingham
On 9 June 2017**

**Decision & Reasons Promulgated
On 16 June 2017**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**MS LEILLAH KAFUMBE NAIGA
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms H Aboni (Senior Home Office Presenting Officer)
For the Respondent: Ms R Manning (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal from a decision of the First-tier Tribunal (Judge Nixon hereinafter "the Judge") whereupon she had allowed the claimant's appeal against the Secretary of State's decision of 15 September 2015 refusing to grant leave to remain on human rights grounds.

2. By way of background, the claimant is a national of Uganda and was born on 13 February 1981. She is married and, according to the findings of Judge, has two children. Her husband and the two children are all nationals of Uganda as well, though it is perhaps important to note that it appears the children have both been born and brought up in the United Kingdom.

3. The claimant first arrived in the UK in 2005. It was accepted by the Judge that she had had valid leave since her arrival on 12 September 2005 save for a period of 110 days between February 2011 and May 2011. The various grants of leave she had received had been on account of her studies in the UK and then as a Post-Study Work Migrant under Tier 1 and a General Migrant under Tier 2 of the Immigration Rules. The last grant of leave was given until 15 May 2016. The claimant had then, prior to that leave expiring, sought a grant of indefinite leave to remain on the basis, or at least principally on the basis, that she had clocked up over 10 years continuous lawful residence.

4. The Secretary of State refused the application because it was considered that, with respect to the Immigration Rules, she did not have the claimed period of continuous lawful residence due to the 110 day period referred to above. That meant, said the Secretary of State, she did not meet the requirements for indefinite leave to remain on the grounds of long residence as set out in paragraph 276B of the Rules. The respondent also thought that, with respect to Article 8 of the European Convention on Human Rights (see ECHR) she did not satisfy the requirements of Appendix FM nor those contained within paragraph 276ADE of the Rules. The Secretary of State also thought that there were no exceptional circumstances to justify a grant of leave under Article 8 outside the Rules.

5. The Judge heard the appeal on 18 October 2016. There was no cross examination of the claimant or her husband. The Judge accepted that the 110 day gap had been attributable to an error made by the claimant's then employer, but it was concluded that the long residence requirements within paragraph 276B were not satisfied. It was also decided, and indeed the contrary does not appear to have been argued, that the claimant could not bring herself within the requirements of Appendix FM or paragraph 276ADE. As to Article 8 outside the rules, though, the Judge reached a different conclusion and said this:

“ 15. ... however, I find that there are arguably compelling circumstances in this case to go on to consider the case under Article 8 and I bear in mind the decision in *SS(Congo) [2015] EWCA Civ 387* when reaching this conclusion . As a starting point, I remind myself of the sequential questions laid down by Lord Bingham in *Razgar [2004] UKHL 27*.

17. I find that the appellant has established a private life during her 11 days in the UK. Aside from her work for the charitable organisation by which she is employed, I have also seen letters regarding her work for the Black Health Network, the New Communities SF forum and the Uganda Muslim Community and I find that she has proved herself to be an asset to the community. I have also seen letters from others who speak highly of her character. I note that she lives in the UK with her husband and children, all of whom have integrated into society. I further note that she has a place at Warwick University as an MA Social Work Course (sic) thus furthering the likelihood that she will be an asset to the community and the economy as a whole.

18. I find that if she were removed, that removal would clearly interfere with the significant and worthwhile private life she has established and she could not continue her contributions to the UK society from abroad. In carrying out the necessary balancing act, I am obliged to bear in mind the public interest considerations under 117B of the Nationality, Immigration and Asylum Act 2002. I note that she and her family have lived in the UK for over a decade, they speak English, provide a valuable contribution to the community and are financially independent. Accordingly, I find her removal would be disproportionate to the need for effective immigration control and would constitute a breach of her Article 8 rights. This appeal must succeed in Human Rights grounds.”

6. The Secretary of State sought permission to appeal to the Upper Tribunal and, on 16 February 2017, permission was granted by a judge of the First-tier Tribunal who said this:

“It is arguable that no proper balancing exercise has been carried out and that insufficient consideration has been given to the public interest in maintaining immigration control.”

7. The matter was then listed before me, initially, for a consideration as to whether or not the Judge had erred in law and, if so, what should flow from that. The directions also made provision for the possible re-making of the decision (should that be necessary) at the same hearing. Representation was as stated above.

8. Ms Aboni argued that the Judge's reasoning was inadequate. In that context she relied very much upon the written grounds of appeal. She argued that the Judge had not had proper regard to the content of section 117B of the Nationality, Immigration and Asylum Act 2002 and, in particular, to a requirement to attach only little weight to a private life in the UK which had been established in circumstances where the claimant's immigration status had been precarious. Pausing there, it might seem a little odd to regard this claimant's immigration status as having been precarious given that she has, for the most part, had valid leave properly obtained. Nevertheless, and there was no disagreement about this before me, case law is such that anything falling short of indefinite leave to remain is to be characterised as precarious within the meaning of that section of that Act.

9. Ms Manning argued that it was readily apparent that the Judge had had regard to section 117B because it had been specifically mentioned. The Judge had not been required to refer to that section in any great detail. When the decision was read as a whole it was apparent that a proper Article 8 balancing exercise had been carried out and that the challenge brought by the Secretary of State was no more than disagreement with the outcome.

10. As I indicated to the parties, I have concluded that the decision of the Judge did involve the making of an error of law. In that context, the key reasoning for the decision is relatively brief. That, of itself, is not to be criticised. However, whilst the Judge did refer to section 117B, it has not been explained how the Judge felt able to allow the appeal purely on the specified private life grounds in the face of a statutory requirement that little weight was to be attached to the claimant's private life. I am not at all saying that it is impossible for an appeal to succeed on private life grounds notwithstanding the content of 117B. But I do say that, on the facts of this case, and given that the Judge was relying exclusively upon private life grounds to which she referred in her decision, it was incumbent upon her to offer something by way of a further explanation as to how the appeal could succeed on that basis notwithstanding a clear statutory requirement concerning weight.

11. There are, in fact, further errors. In looking at paragraph 18 it is clear that the Judge attached some weight to what she found to be the claimant's "valuable contribution to the community". That would seem to link to the finding at paragraph 17 that she has been "an asset to the community. However, in my judgment, whilst the Judge might very well be right about all of that, article 8 is not intended to reward good citizenship or a high community value. Such considerations are essentially neutral as Ms Manning accepted. Further, I accept Ms Aboni's submission that the ability to speak English and to be financially independent are also neutral factors and I did not understand Ms Manning to be arguing against that. So, a substantial part of the rationale for the decision, appearing at paragraph 18, is based upon a wrongful categorisation of neutral factors as positive ones from the claimant's perspective.

12. In the circumstances I have concluded that the Judge did err in law (though I can see why the Judge arrived at her decision) and the decision must be set aside. I would also observe that, although the Judge did not treat this as a matter of significance weighing in favour of the claimant (or at least did not make it clear that it was being treated as such) the fact that the claimant would have satisfied the rules relating to indefinite leave to remain on the grounds of long residence but for the admitted fault of others might, on one view have been regarded as quite a powerful argument

in favour of her Article 8 appeal outside the rules. In that context, I would not have thought that such an argument ought to be categorised as a “near miss” argument because she is not simply stating she came close to the 10 year period but, rather, is drawing attention to an unusual occurrence which it might be thought the rules covering Article 8 do not adequately cater for. I did wonder whether it might be that the Judge did have this in mind when making her decision but since she did not say so, I cannot conclude that she did. However, given what I have decided to do regarding the future conduct of this appeal, the significance or otherwise of such an argument will be for another judge to decide.

13. When I told the parties I was going to set the decision aside, both representatives indicated that they considered it appropriate for me to remit to the first-tier for a complete rehearing. Whilst I was of the view that matters could have been dealt with more speedily in the Upper Tribunal (indeed I thought we could proceed to re-making straightaway at the same hearing) I do take the point that further fact-finding is necessary and I bear in mind that the First-tier Tribunal is an expert fact-finding body. Given that and given the agreement between the two representatives, I have concluded that remittal is the appropriate course. I have, accordingly, made some brief directions regarding remittal but they are brief because of a reluctance to, as it were, tread on the First-tier Tribunal’s toes.

Decision

The decision of the First-tier Tribunal involved the making of an error of law. Accordingly, its decision is set aside and the case is remitted for a complete rehearing before the First-tier Tribunal.

No anonymity order is made.

Signed:
Upper Tribunal Judge M R Hemingway

Date: 15 June 2017

TO THE RESPONDENT

No fee award is made.

Signed:
Upper Tribunal Judge M R Hemingway

Date: 15 June 2017

Directions for the First-tier Tribunal

1. The appeal is remitted for a complete rehearing before the First-tier Tribunal. None of the previous findings and conclusions are preserved.
2. The rehearing shall take place before a judge of the First-tier Tribunal other than First-tier Tribunal Judge Nixon.

Signed:
Upper Tribunal Judge M R Hemingway

Date: 15 June 2017