



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21391/2015

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2017

Decision & Reasons Promulgated
On 30 October 2017

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

MRS HOPE CHIGEMEZU UKPENE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria who was born on 13 June 1972. She appeals against the determination of First-tier Tribunal Judge Zahed promulgated on 5 December 2016 following a hearing at Hatton Cross on 14 September 2016. I am satisfied that notwithstanding the fact that somewhat less than three months passed between the hearing and the promulgation of this determination the appellant has suffered no prejudice. It was a matter which was dealt with largely on the basis of material that was placed before him and there were no credibility findings or issues on credibility which might have been tainted by the fact that there was a delay between the hearing and the promulgation of the determination.

2. The appeal to the Tribunal was against the decision made by the respondent on 21 May 2015 refusing to vary her leave on the basis of an application which had previously been made using what is called FLR(O), that is, on the basis of a family and private life outside the Rules.
3. The immigration history of this appellant is as follows. She entered the United Kingdom on 5 April 2006 with leave granted as a visitor from 28 February 2006 until 28 August 2006 and during the period of her extant leave she returned to Nigeria. Whilst she was in Nigeria she was issued with a multi-entry visit visa. She did so in the name which we know her as, namely Mrs Hope Ukpene. It was valid from 9 May 2007 until 9 May 2009.
4. She then re-entered the United Kingdom and remained during a period in which she was convicted and sentenced to twelve months' imprisonment for possessing false or improperly obtained or another's identity documents. As a result of that she made a voluntary removal to Nigeria on 21 August 2007. However, the conviction and the voluntary return were all done under a different name; that is under the name of Mrs Hope Odoemena.
5. The appellant then re-entered the United Kingdom on 8 December 2007 using the multi-entry visa which had been issued on 9 May 2007. However, bearing in mind the removal which had been effected some time before and the fact that she had been convicted of an offence under a different name, it is clear that her activities on re-entry were unlawful in character because of the deception that had previously been used. Once again using the name Odoemena, she was subject to an exclusion order dated 4 November 2008. That is consistent with her voluntary removal on 21 August 2007. Such an exclusion order is approved by the Secretary of State and it appears to have been put in place because the decision maker in relation to that exclusion order did not know of her entry into the United Kingdom under a different name. It was likely that the order was put in place on the assumption that the appellant was still in Nigeria, having been voluntarily removed in 2007.
6. The immigration history continues with an application that was made on 9 October 2008 for leave to remain as the spouse of a settled person. Unfortunately that was refused because the appellant had provided false documents in the form of bills in support of her application. The refusal was therefore made on that basis. Consequently, up until 2008 there had been a number of instances where the appellant had breached immigration law. In doing so she had accumulated what can only be described as a poor immigration record. Clearly her conviction and sentence of imprisonment counted against her; so, too, her application for entry clearance or entry into the United Kingdom on the basis of using two different names; and also the application that was made on 9 October 2008 which had been supported by false documents. In addition her immigration history was marred by the fact that there was an exclusion order, albeit in a different name from the name I am dealing with, which had been approved and which in essence reflected the fact that she had no right to be in the United Kingdom.

7. The decision maker then went on to deal with the requirements of the Immigration Rules and concluded by reference to Appendix FM and paragraph 276ADE that the appellant did not meet the requirements for entry clearance or for further leave to remain and accordingly the application was refused under the Immigration Rules and was then considered under Article 8 by reference to exceptional circumstances and the circumstances were not said to be exceptional.
8. Running through the application there are two matters which require my separate consideration. The first is that the application was made on the basis of FLR(O) and the application which I have seen, which runs to 36 pages, made a reference at page 13 to the fact that she was a widow and that her husband's estate was the subject of litigation. She said at page 13 of the application:

"Bereaved partner. Death certificate, marriage certificate. I am applying for an extension of stay in the UK as a bereaved partner of a British citizen. I was legally married to my late husband till he died. My husband left properties behind for me to stay and take care of in the United Kingdom. I have my notice of home rights on one of my husband's properties. I entered a caveat in probate court under Family Law Act over my late husband estate",

and that is indeed exactly what happened. There was a caveat entered in relation to her husband's estate. She had met her husband in 2007 or 2008 and they had married in 2008. He died in 2014.

9. There was also a reference on page 29 of 36 in the application to the fact that she is a bereaved partner and she was married to her husband until he died, that they married on 4 July 2008, he died on 15 February 2014. They had therefore been together as man and wife for something slightly under six years and in support of that part of her claim she produced letters about not only her husband's death and the marriage but also evidence as to the fact that they were living together when he died. The caveat was also produced.
10. It was on this basis that the Secretary of State came to make the decision under the private life outside the Rules. The decision letter, which is featured in the bundle, went through the various elements to the Rules and it looked at the decision in relation to claim that she was involved in litigation over the estate of her late husband under the general heading of exceptional circumstances. The decision maker said:

"In support of your claim you state that you wish to remain in the United Kingdom as during the time you cared for your late husband you both had private life in this country. You further state that you are contesting your husband's children's application for probate. This has been carefully considered as an independent adult who is not dependent on family members. This is not considered to be a compelling or compassionate reason to grant leave to remain. Therefore it is not accepted that there are exceptional circumstances which would mean removal is inappropriate in your case."
11. The grounds of appeal pick up in somewhat limited form the point about the probate proceedings, saying in paragraph 7: "Appellant has civil proceeding pending before

UK court and the matter is disputed by the other parties and the SSHD failed to take into consideration.” That of course as a matter of fact is wrong because from the passage that I have already read out on the last page of the decision letter, which is page 5 of 8, the Secretary of State had indeed given consideration to the claim. Nevertheless it is a point which I am required to consider now. Under paragraph 8 of the grounds the appellant also alleges that the Secretary of State had failed to consider the application under those parts of the Rules which deal with a bereaved spouse. It is in this way that the matter comes before me.

12. The evidence that was adduced in relation to the probate dispute was, as I have said, very limited and it was treated by the judge in that limited fashion. The determination deals with the fact that the applicant had a poor immigration history and that her various applications had failed and that she was not able to succeed under Appendix FM as she failed to meet the suitability requirements having been convicted of an offence for which she had been sentenced to at least twelve months’ imprisonment and that she was subject to an exclusion order. Both of those matters are raised in the suitability requirements of the Rules.
13. The First-tier Tribunal Judge then recited the fact that the respondent could not succeed under paragraph 276ADE(1) as she was then 43 years old, she had been in the United Kingdom only since 2007 and although there would be initial hardship in her returning to Nigeria she had remained in Nigeria for many years of her life prior to her arrival in the United Kingdom.
14. The First-tier Tribunal Judge went on to deal with the evidence and the submissions that had been made and recorded in paragraph 8 that the appellant wished to remain in the United Kingdom because she was contesting the wills that her husband purportedly made in 2012 and in 2013 which make no mention of her. He then went on to recite the estate of her late husband, an estate valued in the region of £600,000, and that the two wills made in 2012 and 2013 respectively were created in circumstances which rendered them unenforceable. That is itself supported by the copy of the particulars of claim in the action which has been commenced by the appellant against the defendants, who are the beneficiaries under the will of her late husband. Those beneficiaries are the deceased’s seven children. The allegations contained in the particulars of claim make serious reading.
15. It appears that when the will was made on 27 August 2013 there was evidence that he was suffering from advanced vascular dementia and had had a deteriorating memory since 2009, that he was completely reliant on others for all his personal and medical needs, that he was unable to walk or get out of bed without assistance or to feed himself and was unable to remember his medication or indeed toilet himself independently. He had no control over his financial affairs and it is said that he was disorientated and had difficulty in communicating. He scored just 2 out of 30 on a mini mental state examination on 29 May 2013. That was just a few months before he executed the will in question and, at that same time, he was unable to sign the sheet to confirm his personal property upon admission to hospital.

16. It was on the basis of those circumstances that it was said that he did not have a capacity to enter into his will and that he did not have either knowledge or approval of its contents. There is reference made in the particulars of claim to a doctor who was treating the deceased who, on 30 December 2010, noted that the deceased suffered

“...gradually deteriorating memory last eighteen months. Can’t remember to take any meds or eat. Sometimes talks to himself”.

There is also an allegation made that the signature of the deceased was not witnessed by the witnesses who purported to sign it and indeed that the signature may not even have been that of the deceased.

17. Those proceedings were settled by Anna Metcalfe of Counsel and clearly made out a substantial claim that the appellant was pursuing an action in the United Kingdom courts in relation to the will. However, there are a number of features that are significant about that claim. First that it was being pursued by the appellant with the assistance of solicitors and Counsel. Secondly that the matters which were raised, namely matters such as capacity and consent to the content of the will, were all based upon the deceased’s medical condition.
18. These are not matters of course upon which the appellant herself is able to give anything but limited information. It will of course depend on careful scrutiny of the medical notes and the circumstances in which these wills of 2012 and 2013 were executed. They are largely matters outside the personal knowledge of the appellant. Insofar as she has knowledge, that knowledge is likely to be less weighty in its content than any medical evidence.
19. That was the basis upon which the claim was advanced before the First-tier Tribunal Judge. What is, however, significant is that, although the appellant herself was making out the claim that she could not pursue this claim unless she was in the United Kingdom, there was no material (as far as I am aware) from the appellant’s *advisers* before the First-tier Tribunal saying that her presence in the United Kingdom was a necessity.
20. First of all, there could have been an opinion in the form of opinion evidence from the appellant’s Counsel, Ms Metcalfe, or from her solicitors in that case, which I understand to be Irwin Mitchell LLP. They might have been able to deal expressly with the necessity of the appellant’s presence.
21. Secondly, for the reasons that I have said, the need for the appellant to remain in the United Kingdom during the course of the litigation was limited in that there was no reason why she should not give instructions to her solicitors from out of country.
22. Finally, if it was necessary for her to enter the United Kingdom at a later stage then that entry might be facilitated by an application for leave to enter as a visitor supported by her legal practitioners. Indeed, that might even be supported by an application made to the judge for an indication that her presence in the United Kingdom was necessary for the furtherance of justice in the pursuit of this claim.

23. That was therefore the situation that was before the First-tier Tribunal Judge and he dealt with that in his determination in what I consider to be an appropriate way. Although the determination is short he makes the salient point in paragraphs 9 and 12 that he had seen the probate court documents. He had considered her need to be in the United Kingdom in order to pursue her claim and her statement that, were she to be removed, she would not be able to pursue her claim. He did not accept this. He said:

“I find she has solicitors that can pursue her claim and that she can apply for her evidence to be given by video link if need be. I find that the appellant can give instructions and communicate with her solicitors using modern means of communication.”

24. In the determination the judge goes on to say that, since the challenges that are made to the wills of 2012 and 2013 relate to the mental capacity of the deceased to enter into a valid will, he concluded that this would be provided by way of medical evidence as to the deceased’s mental state at the relevant time and he noted that the deceased was receiving treatment for his mental impairment at the relevant time. Those matters, the First-tier Tribunal Judge decided, could be pursued without the appellant being in the United Kingdom.

25. In my judgment that was a perfectly justifiable conclusion to reach on the basis of the very limited material that was before him and in particular in the absence of any evidence from practitioners to say that her presence was required during the course of the preparation of the hearing of this claim in court.

26. The appellant has provided to me, (which I have looked at out of an abundance of caution), a letter which was not before the First-tier Tribunal Judge but post-dates the promulgation of that determination on 5 December 2016. By way of a letter dated 19 December 2016 the appellant’s solicitors wrote to her solicitors acting on behalf of her immigration matters in these terms:

“We confirm that our client may be required to attend court in respect of her ongoing claim. Legal proceedings were served on the defendants on 30 November 2016. Should the court request a hearing for all parties to attend in person or if the matter proceeds to a trial Mrs Ukpene will be required to give witness evidence in representation of her claim.”

27. That falls well short of saying that her presence is required at the moment in order to pursue this action. There may be a case where the court requests a hearing for all the parties to attend in person and, were that to be the case, then her immigration status would doubtless be the subject of comment by her advisers. Were an order or direction to be made, attempts would naturally follow for her to attend if that was necessary. If matters were to proceed to a trial then that, too, would be the subject of a separate application. However, there are numerous occasions nowadays where evidence from those living in another country is dealt with by way of either a telephone call or by a video link, which is permissible, albeit within the constraints of the telecommunication system in operation at the relevant venue. So, in my judgment, although the judge did not have this letter, it does not significantly

advance the appellant's claim to remain in the United Kingdom during the pendency of this litigation.

28. The second point that is made is in relation to the nature of her Article 8 claim. That was dealt with by the First-tier Tribunal Judge. I can encapsulate the nature of the claim. Paul Orji wrote a letter in support of the appellant's claim to remain in the United Kingdom. He described how she has been known to the family for years in Nigeria and had been living with her father as a fiancée since 8 December 2007 before they officially got married on 4 July 2008. Since that time they had been living together happily as a family and he described her as being of good character and a nice person. He also went on to say that his father was 64 years old and had been medically ill both physically and mentally and life had been difficult. As a result of that the appellant gave him much needed support in his daily life.
29. That was the nature of the Article 8 claim principally advanced by the appellant and that was dealt with by the judge by reference to s. 117 of the Nationality, Immigration and Asylum Act, 2002 and the limitations upon granting leave to remain to those people whose private life (or indeed private and family life) was established at a time when they had a precarious immigration status. He concluded that since the death of her husband she had no appreciable family life in the UK as her only family member was her husband and that her husband's children, as defendants to the action that she was bringing, could not be considered to be family members to whom there was a special relationship that might require her continued presence.
30. He recorded the simple fact that the appellant had been unlawfully in the United Kingdom since being convicted and was subject to an exclusion order. He recorded the fact that she had lived in Nigeria for some 35 years. Although she had been in the United Kingdom for nine years, those were nine years of unlawful presence and the relationship that developed with her late husband was whilst she was here unlawfully and her immigration status was precarious.
31. He found that the appellant could pursue her claim from Nigeria, communicating with her sisters using email and telephone and that it was proportionate to remove her. Those findings were properly open to the First-tier Tribunal Judge. He was entitled to treat the claim as being a claim in which it was proportionate to remove her to Nigeria.
32. The grounds of appeal are several in number. There is a reference in ground 1 to the fact that the judge got the date wrong of her return to the United Kingdom in paragraph 2 of the decision. However, it is plain that this is of no significance because he chose the right date in another part of the determination. In any event it is not a significant matter as far as the determination is concerned.
33. Ground 2 raises a matter which had not, as far as I am aware, been raised in the appeal before the First-tier Tribunal Judge; at least it had not been argued before him. The judge had not expressly dealt with the fact that the appellant was a bereaved partner. During the course of the hearing this afternoon I have looked to see whether

there are provisions which permitted the appellant to remain on the basis of her status as a bereaved partner. They are dealt with in Appendix FM.

34. The identification of the relevant sections is somewhat difficult and so I am going to identify the relevant passages by reference to the Immigration Law Handbook produced by Margaret Phelan and James Gillespie (9th edition). The relevant passages set out on page 1155.
35. The requirements to be met for indefinite leave to remain in the UK as a bereaved partner are that the applicant must be in the United Kingdom and must have made a valid application for indefinite leave to remain as a bereaved partner and must not fall for refusal under any of the grounds in the suitability requirements and the applicant must meet all the requirements of eligibility for indefinite leave to remain as a bereaved partner. So much is clear from BPILR.1.1.
36. The eligibility requirements for indefinite leave to remain as a bereaved partner are set out in E-BPILR. Those requirements establish that all of the requirements have to have been met. The requirement that the appellant and her partner were in a relationship which was genuine and subsisting and which each of the partners had intended to be a permanent arrangement was doubtless made out but that alone was not enough.
37. The Rules go on at page 1156 to the effect that if the applicant met all the requirements for indefinite leave to remain as a bereaved partner the applicant would be granted indefinite leave to remain, that is D-BPILR.1.1. However, as far as D-BPILR.1.2 and the requirements there are concerned, these provide if the applicant does not meet the requirements for indefinite leave to remain as a bereaved partner only because the suitability requirements at 1.5. or 1.6. applied, the applicant will be granted further limited leave to remain for a period not exceeding 30 months, subject to a condition of no recourse to public funds. Finally, if the applicant does not meet the requirements for indefinite leave to remain as a bereaved partner that the application will be refused.
38. Accordingly I have considered the effect of the suitability requirements which are set out at page 1152 of Phelan's textbook. The suitability requirements include that the applicant will be refused indefinite leave to remain on grounds of suitability if any of the following paragraphs applied. Those paragraphs include at S-ILR.1.4.:

"The presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than four years but at least twelve months, unless a period of fifteen years has passed since the end of the sentence."
39. The appellant has been sentenced to a period of at least twelve months and a period of fifteen years has not passed since the end of the sentence. Accordingly she does not meet the suitability requirements set out in paragraph 1.4. It follows that she does not meet the requirement for indefinite leave to remain as a bereaved partner. That does not arise only because 1.5. and 1.6. of the suitability requirements apply because she does not meet the requirements of 1.4.

40. That rather complex route, however, establishes that whilst there was no application made by her as the status of a bereaved partner it would not have succeeded because she did not meet the requirements of the Rules in that capacity. Accordingly the grounds which seek to say that the judge failed to take into account her position as a bereaved partner are bound to fail.
41. I need spend no more time on the grounds of appeal. All that I have said so far is directed to the relevant material. It is said that the First-tier Tribunal Judge in ground 4 failed to address and make reasoned findings on the central issue of the appeal, namely that the respondent issued the appellant with leave to enter after she got married to a British citizen whom she took care of until his demise in 2014. It does not seem to me that that is a material consideration or a ground for appeal as a result of the circumstances which I have set out.
42. There are also general grounds of challenge that the First-tier Tribunal Judge failed to take into account relevant considerations or reached a decisions not justified by the evidence. I am satisfied that, although the determination was a short one, this was because the issues were relatively straightforward. The outcome was an almost inevitable one in view of the appellant's poor immigration history and the circumstances in which she found herself as the widow of a British citizen.

DECISION

The First-tier Tribunal Judge made no error in his determination and the determination shall stand.

No anonymity direction is made.

**ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL**

15 September 2017