



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09068/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6th December 2019

Decision & Reasons Promulgated
On 23rd December 2019

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR CHINEDU HENRY AGUOCHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Uddin, Counsel

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Flynn promulgated on 1st August 2019. The grounds of appeal assert that:-

- i. The judge fell into material error in not fully appreciating or assessing the merits of the case in the light of the evidence before him and he depended overly on a credibility issue in determining a human rights claim, citing *Awala [2015] CSOH 73*, paragraph 22, whereby it was held that it was "not proper to reject an applicant's account merely on the basis that it is not credible or not plausible". It was advanced that at paragraph 8 of the First-tier Tribunal determination, the judge acknowledged that the

Secretary of State conceded that the appellant had spent almost half his life in the UK as at the date of the application on 3rd August 2017. In paragraph 10 there appeared to be an acceptance that the appellant had lived for more than half his life in the UK and thus the appeal should have been in favour of the appellant as opposed to the opposite.

- ii. The judge was not clear whether the matter was determined as at the date of hearing or the date of application and thus it was unclear which date the judge considered when assessing the merits of the case. At paragraph 37 the Secretary of State accepted that the appellant had formed a private life in the UK but went on to make a negative decision against the appellant. At paragraph 44 the judge stated the appellant had not provided any evidence of dependency apart from economic support and thus he is in effect accepting that there was dependency.
2. The appellant was brought into the UK as a child and has no control over this and at paragraph 66 the judge accepted that the appellant was led to believe that he was allowed to work but then criticised. He could not be blamed for something that happened whilst he was a minor.
3. Permission to appeal was granted on the basis that it was arguable that the judge should have more clearly stated the material date and when taken with the claimed contradictions in the Judge's findings referred to above, whereby the judge accepted the appellant had no family or support in Nigeria, but then made a contrary finding on the same point at 70.

Analysis

4. At the hearing Mr Uddin relied on the permission granted by Judge Osborne such that the judge should have stated the material date for considering evidence in relation to the appeal and he did not do so. On this particular issue, however, the judge at paragraph 41 stated "In human rights appeals the burden of proof is on the appellant, the standard of proof is lower than the normal civil standard and the date at which to consider the evidence is the date of the appeal". In relation to Article 8 the standard of proof is the civil standard (the balance of probabilities) but that misapprehension was to the appellant's advantage. Mr Tufan submitted that the reference to 'appeal' was shorthand for "the appeal hearing".
5. On reading the decision it is clear that the judge considered post decision evidence. For example, on examining paragraph 55, the judge states "looking at the evidence as a whole" and at paragraph 56, he refers to "my conclusion is fortified by the failure of the appellant's aunt to attend the hearing or to provide any evidence". This clearly indicates that the judge took into account the evidence that post-dated the application and decision and took into account factors that were relevant as at the date of the appeal hearing. When reading the decision as a whole it demonstrates that the evidence and all the evidence was carefully analysed by the judge and there was no confusion as to the date considered relevant for the determination of the facts. The Immigration Rules

with respect to paragraph 276ADE(1)(v) contain a condition relating to the date of the application.

"276ADE (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:

...

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment)"

6. The judge had recorded and was aware at the outset that the appellant was born in 1993 and it was open to him to reject the evidence that the appellant had entered the United Kingdom in December 2004. The evidence for that proposition stemmed from letters from Mr A Roland Director of Studies at Arolly Secondary Commercial College in Nigeria but there were copies of the same letter one of which was dated 15th January 2005 and another which was identical dated 2007. It was entirely open to the judge to find those letters not credible because of their duplication and their alteration and the focus on credibility was relevant to the finding as to the appellant's entry. The judge identified there were blank spaces in the letters and they were inconsistent with the appellant's own evidence. The 2018 clarification letter from the Personal Assistant to the Director did not clarify the concerns raised in respect of the earlier duplicated letters. At paragraph 53 the judge noted that both letters (2005 and 2007) stated that it was the 'parent' who made it clear to the management that the appellant was leaving college albeit that the mother was said to have died in 2003 and the appellant had not mentioned his father and the evidence was that he had never known him. The judge did not find it credible, and it was open to him to do so, that the college director would not use the word 'parent' if the appellant had lost his only known parent more than a year and a half earlier and had been in the care of a guardian since then.
7. The judge gave, when looking at the evidence as a whole adequate reasoning for placing no weight on the 2005, 2007 and 2018 letters or the report from Arolly College which was undated and therefore of no assistance. That was cogently explained.
8. Additionally, the judge factored in that appellant's aunt did not attend the hearing to provide evidence on matters which she could have done and that the appellant although stating he travelled on his own passport did not provide that passport. The judge also identified that other witnesses, the cousins, as to the date of entry did not attend. In particular, the judge at paragraph 62 stated that he did not find the appellant credible owing to the inconsistencies detailed as to his entry in 2005. It was open to the judge to find that the appellant entered in 2009.
9. In sum, the focus on the credibility was not misplaced or overly emphasised. The evidence was simply not present in acceptable form and mere disagreement about the weight to be accorded to the evidence, which is a

matter for the judge, should not be characterised as an error of law, *Herrera v SSHD* [2018] EWCA Civ 412.

10. As Mr Tufan pointed out the apparent contradictions in the findings between paragraphs 8 and 10 was framed by the reasons for the refusal letter which mistakenly referred to him having lived in the UK for eleven years as at the date of the application, however the paragraph above that statement in the reasons for refusal letter stated “you claim to have entered the UK on 24th April 2005”. The Secretary of State’s refusal letter proceeded to identify that “despite requesting further information showing you have been in the UK since 2005 you have not provided any evidence showing residence in the UK prior to 2009”. The letter specifically stated it was not accepted that he had been in the UK for more than half his life. That is not a concession by Mr Eaton during the First-tier Tribunal and indeed at paragraph 8 it is recorded that “Mr Eaton acknowledged mistakes in the reasons for refusal letter and had conceded that the appellant had spent almost half his life in the UK at the date of application”. I conclude that the ‘and’ underlined was a typographical error and should have been ‘that’. Even if I am wrong about that, the inclusion, however, of the word ‘almost’ is definitive in that the appellant had not succeeded in fulfilling Paragraph 276ADE(1)(v).
11. To my mind there is no contradiction and the judge proceeded properly to analyse and assess in terms open to him. ‘Almost’ half his life at the date of application does not fulfil the Immigration Rules. It is clear from paragraph 64 of the judge’s determination that he made a finding that the appellant entered the United Kingdom in 2009. At that point the appellant would have been 16 years old (born in 1993). The appellant therefore came nowhere near having spent half his life in the United Kingdom by the date of the application in 2017.
12. It was entirely open to the judge to find, at paragraph 37, that the appellant had formed a private life in the UK but to proceed to make a negative decision against the appellant. The appeal is made on human rights grounds but the fulfilment or otherwise of the Immigration Rules are relevant to a proportionality exercise. The judge cited *Miah (section 117B NIAA 2002 – children)* [2016] UKUT 00131(IAC) which states that Section 117B(1) to (5) applies to all regardless of age albeit that all other relevant factors may be weighed into the balance. The judge accepted the appellant entered the United Kingdom as a minor and there is no indication that that fact was not regarded.
13. Mr Uddin also took issue with the judge’s approach at paragraph 70 where he wrote: -

‘Even if I accepted Mr Lemer’s submissions that the appellant had no support or employment prospects in Nigeria, which I do not, that would not alter my conclusion that the appellant has failed to show there are very significant obstacles preventing him reintegrating into Nigeria’.
14. This Mr Uddin suggested, showed the judge concluded that under no circumstances would even very significant obstacles prevent a removal to

Nigeria. I do not read the paragraph in that way. First the judge clearly did not accept Mr Lemer's, the appellant's representatives, submissions. Secondly albeit submissions were made on that basis he found that the appellant had failed to show that there were very significant obstacles preventing him reintegrating into Nigeria. Thirdly even if the statement was poorly phrased it is immaterial because he clearly did not accept the submissions made that the appellant had no support or employment prospects in Nigeria.

15. The judge from his analysis of the appellant's integration into the UK and his ties to Nigeria clearly took a holistic approach. The judge specifically found that he was not satisfied on a balance of probabilities that all the appellant's family were deceased or outside Nigeria. Not least the aunt had obtained documentation from Nigeria which demonstrated that she had retained contacts there and whom the judge found could "be able to advise the appellant and provide him with emotional support even if they are unable to offer financial support or accommodation" (paragraph 69).
16. The judge was thus fully aware of the fact that the appellant was brought to the UK as a minor, was evidently schooled in Nigeria, and even on his own case overstayed a visit visa. The judge was obliged to apply Section 117 of the Nationality, Immigration and Asylum Act 2002 and proceeded correctly to find that little weight should be attached to any private life established by someone with precarious status. The judge found that the appellant had received an education and accessed public funds through medical attention in the UK and it was open to the judge to find that the appellant had delayed regularising his statement after coming of age, (paragraph 73). As set out at Section 17B (5) of the Nationality, Immigration and Asylum Act 2002

"Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious".

17. *Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test)* [2017] UKUT 00013 (IAC) also confirms that

"The Parliamentary intention underlying Part 5A of NIAA 2002 is to give proper effect to Article 8 ECHR. Thus a private life developed or established during periods of unlawful or precarious residence might conceivably qualify to be accorded more than little weight and s 117B (4) and (5) are to be construed and applied accordingly".

18. Finally, there was a contradiction asserted on the part of the judge who erred because at paragraph 44 he stated "there is no evidence of dependency, apart from the economic support she provides. I am not satisfied that their ties amount to family life for the purpose of Article 8". That was a finding which was not contradictory. Dependency can consist of a variety of factors, including emotional support and it was open to the judge to find that the economic support did not necessarily equate to "family life for the purpose of Article 8". Family life is a particular concept and clearly not made out here, *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31; [2003] INLR 31.

19. Ultimately the judge found that the evidence was either absent or unreliable to support the contention that the appellant had been in the UK half his life at the date of the application, but, moreover, having failed to fulfil the immigration rules there were no unjustifiably harsh consequences to the appellant's return to Nigeria. The judge also considered all relevant facts when deciding the appeal and that is evident from a careful reading of the comprehensive decision. The claimed contradictions were not in fact contradictions.
20. I find therefore there are no material errors of law. The judge looked at the evidence as a whole, and clearly fully appreciated and assessed the evidence when finding that the interference with the Article 8 rights of the appellant, which were limited in degree of private life established in the UK, was justified and proportionate.
21. The grounds do not disclose any material errors of law and the decision will stand.
22. The appellant's appeal remains dismissed.

No anonymity direction is made.

Signed *Helen Rimington*

Date 17th December 2019

Upper Tribunal Judge Rimington