



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/18573/2019 (V)

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House (via
Skype)
On 15 September 2020**

**Decision & Reasons
Promulgated
On 17 September 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**OYOMA [O]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Vidal, of Haris Ali Solicitors

For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Nigerian national who was born on 28 August 1970. She appeals, with leave granted by the First-tier Tribunal, against a decision which was issued by Judge Greasley on 29 January 2020, dismissing her appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant's date of entry to the United Kingdom is in dispute, and is at the centre of this appeal. She maintains that she entered in 1999, using a passport belonging to another person, and remained in the UK unlawfully thereafter. In 2010, she met her husband and a relationship commenced. They married on 23 January 2011 and it is accepted by the respondent that she was present in the United Kingdom from that point onwards. Her husband became a British citizen in 2016. On 10 May 2018, she made an application for leave to remain on human rights grounds. The 61-page application form was accompanied by a raft of evidence and a supporting letter from the appellant's representatives. That letter detailed the circumstances in which the applicant had come to the United Kingdom in 1999 and the basis of her claim to remain in the UK with her husband. It was submitted, in particular, that their relationship could not continue in Nigeria because he was dependent upon the NHS for treatment and that there would be very significant obstacles to her re-integration to Nigeria, such that she satisfied paragraph 276ADE(1)(vi) of the Immigration Rules. It was submitted, in summary, that the appellant's removal would be in breach of Article 8 ECHR.

The Respondent's Decision

3. The respondent initially refused the application and certified it under section 94 of the Nationality, Immigration and Asylum Act 2002, thereby preventing the appellant from appealing to the FtT. On receipt of a Letter Before Action, however, she withdrew the certificate and issued a further decision, on 30 October 2019, which carried a right of appeal. She accepted that the appellant enjoyed a genuine and subsisting relationship but not that there were insurmountable obstacles to that relationship continuing in Nigeria. She did not accept that the appellant had resided in the UK since 1999 or that there would be very significant obstacles to her reintegration to Nigeria. And she did not accept that there were exceptional circumstances which warranted a decision to grant leave to remain outside the Immigration Rules with reference to Article 8 ECHR.

The Appeal to the FtT

4. The appellant appealed, and her appeal came before the judge on 24 January 2020. She was represented by a Ms Aziz, who was thought by the judge to be a member of the Bar, although her s84 form and her skeleton argument suggest otherwise. The respondent was represented by a Presenting Officer, Ms Jones. The judge heard oral evidence from the appellant and her husband. He heard submissions from the representatives and then he reserved his decision. In his reserved decision, the judge

concluded that the appellant could not satisfy the Immigration Rules and that her removal would not be contrary to Article 8 ECHR. He did not accept that she had entered the UK in 1999. He found that there were no insurmountable obstacles to her continuing her life with her husband in Nigeria. He considered the partner's health problems to have been exaggerated and the appellant to have shown a blatant disregard for immigration control in the United Kingdom. The public interest in her removal outweighed her rights under Article 8 ECHR.

The Appeal to the Upper Tribunal

5. The central complaint in the grounds of appeal is of procedural impropriety. Those grounds were settled by Ms Vidal, who did not appear below. She seized upon what was said by the judge at [22] of his decision:

“It was agreed between me and the representatives that there was no formal requirement to call oral evidence from two friends, [PM] and [RE], both of whom provided witness statements of 14 January respectively. Both indicated that they had known the appellant for approximately 20 years.”

6. Ms Vidal submitted that it was not open to the judge, having declined to hear from these two witnesses, to find at [27] of his decision that Ms [E] would not have been able to recall the precise date and year when she first met the appellant in the United Kingdom. That was a finding which cast doubt on the credibility of the witness, and it was procedurally improper to disbelieve an available witness without such concerns being put to them.
7. I asked Ms Vidal whether there was any evidence to explain what had happened before the judge. There was no statement from Ms Aziz in the Tribunal's file and the judge's Record of Proceedings, which was essentially legible, shed no light on the discussion which had led to the remarks at [22] of the decision. Ms Vidal had no evidence. She submitted that the procedural error was plain on the face of the decision and that further evidence was not necessary.

Discussion

8. As I put to Ms Vidal in the course of her submissions, I am not so sure that her submission in this respect is correct. The judge's comment that there was 'no formal requirement' for the witnesses to give evidence really sheds no light on the reasons that they did not give oral evidence. There is no formal requirement for anyone, including an appellant, to give evidence in an immigration appeal. Adverse inferences might properly be drawn when a witness (or an appellant) who is available chooses not to give evidence without proper reason but there is no rule,

requirement or even a presumption that oral evidence must be given. To that extent, the statement at [22] is nothing more than a statement of the law; it does not reflect the content of the discussion in any meaningful way. It is clear from the judge's decision that there was some sort of discussion between him and the advocates and the substance of that discussion is critical to deciding whether or not there is an error of law in his decision. I can explain why that is so relatively shortly, although it is necessary to refer to a number of authorities in order to do so.

9. The essential rule is often called the rule in Browne v Dunne (1894) 6 R 67, HL and may be summarised in this way. Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence. The modern approach to the rule has been considered in a number of decisions of the Court of Appeal.
10. In MS (Sri Lanka) [2012] EWCA Civ 1548, the Secretary of State's representatives had declined to cross examine the appellant in the FtT and the UT. Maurice Kay LJ, with whom Munby and Tomlinson LJ agreed, stated (without citing Browne v Dunn) that this had 'the necessary consequence that the Secretary of State must be taken to accept, or at least not to dispute, the appellant's factual account.': [14].
11. In Markem Corp v Zipher Ltd [2005] EWCA Civ 267; [2005] RPC 31, Jacob LJ (with whom Mummery and Kennedy LJ agreed) embarked on a more fulsome examination of the rule in the context of a patent entitlement action. A key witness ("SB") had given evidence before the trial judge but had not been cross-examined on various matters which the judge had proceeded to hold against him. Jacob LJ characterised the rule in Browne v Dunn as one of procedural fairness, and not as one of evidence. At [50]-[61], he considered the modern application of the rule in Browne v Dunn, assisted by dicta from the Commonwealth. He cited with approval a passage from an Australian case, which had in turn cited the then current edition of Phipson on Evidence, which concluded with the observation that "Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, eg if the witness has had contrary notice beforehand, or the story is itself of an incredible or romancing character." I note that the current edition of that work also highlights, at [12-12], that the rule in Browne v Dunn is 'not an inflexible one'. The critical point, for present purposes, is that a judge is not necessarily required to accept (and the opposing party is not necessarily deemed not to challenge) the evidence of a witness if they have had notice beforehand of the intention to challenge their evidence.

12. Drawing on that line of authority, there is a conceivable situation in which the judge could have disbelieved the witnesses even if he had not heard from them. Suppose that there had been a discussion between the judge and the advocates at the start of the hearing, during which it had been made clear that these two witnesses were present and willing to give evidence. Suppose that the Presenting Officer had said that she intended to cross-examine them on the accuracy of their memory of their first meeting with the appellant. If, in those circumstances, the representative had decided not to call the witnesses, it could properly be said that they had had notice of the point to be taken against them and that the trial had been fairly conducted.
13. With Ms Cunha's assistance, however, it became clear that the course of the hearing before the judge was very far from the lines I have contemplated above. Ms Cunha was very helpfully able to produce the note of the hearing which had been made by the Presenting Officer. That note showed that the judge had initiated a discussion about the witnesses at the outset of the hearing and had expressed the opinion that it would not be 'beneficial' to hear from them. It was as a result of that indication that the decision had been taken not to call them to give evidence.
14. However flexible the rule in Browne v Dunn might currently be said to be, I do not think that it incorporates sufficient flexibility to render the proceedings in this case fair. There is no indication in the Record of Proceedings, or in the judge's decision, or in the Presenting Officer's note, that the judge explored with the Presenting Officer what, if anything was to be put to these witnesses in cross-examination. It is wholly unclear, with respect to the judge, why he felt able to express the view that it would not be 'beneficial' to hear from these two witnesses, both of whom tended to support the appellant's claim that she had (at the date of hearing) been in the UK for more than twenty years. The expression of that view was, in my judgment, premature at best, and led to the witnesses not being given an opportunity to deal with the point which was ultimately taken against them by the judge. Procedural fairness in this respect follows what would be expected by the witnesses themselves, who might legitimately be heard to say in a case such as the present: "If only I had known that the judge was concerned by that point, I could have explained by reference to the following."
15. Having brought the Presenting Officer's note to my attention, Ms Cunha (who had not previously considered that note) recognised immediately that the decision of the judge was marred by procedural irregularity. She indicated that she had no opposition to the relief sought by Ms Vidal, which was for the judge's decision to be set aside and the appeal remitted to the

FtT for rehearing de novo. I am satisfied that this is the proper course, since the effect of the judge's error was to deprive the appellant of a fair hearing (paragraph 7.2 of the Practice Statement of 13 November 2014 refers).

16. I should note that Ms Vidal very properly drew to my attention one matter which was not clear from either the judge's decision or the skeleton argument prepared by Ms Aziz for the hearing in the FtT. Reading those documents, one would be forgiven for thinking that this was a case in which the appellant contended that her appeal fell to be allowed on Article 8 ECHR grounds because she satisfied paragraph 276ADE(1)(iii) of the Immigration Rules (twenty years continuous residence in the UK). As Ms Vidal noted, however, this is not a case in which the appellant could contend that she satisfied the terms of that rule in full because the rule applies in terms to those who had accrued that length of residence 'at the date of application'. At the date of this appellant's application, in 2018, she had not accrued twenty's years residence even on her account, since she claimed to have entered in 1999. Ms Vidal explained that the appeal should have been put to the judge not on the basis considered in TZ (Pakistan) [2018] EWCA Civ 1109 (that the appeal had to be allowed on Article 8 ECHR grounds because the Rules were met) but, instead, on the basis that the accrual of that length of residence at the date of hearing was a matter which necessarily militated in the appellant's favour in the balance sheet of proportionality.
17. Even though the appellant was unable, on her own account, to establish that she met the terms of paragraph 276ADE(1)(iii) before the FtT, I am satisfied that the procedural error into which the judge fell was sufficient to vitiate the decision he reached. Even if the appellant could not meet the precise, temporal terms of that Rule, the fact (if established) that she had accrued twenty years' residence at the date of hearing was relevant to the assessment of proportionality. The logic which underpins Chikwamba [2008] UKHL 40, as reflected in what was said by Lord Reed at [51] of Agyarko [2017] UKSC 11, is of some application in the present context. If the appellant would be bound to be granted leave to remain on private life grounds if she made a further application to the respondent, that fact is plainly relevant to the assessment of proportionality, although it cannot be determinative for the reasons explained in Younas [2020] UKUT 129 (IAC). It is in those circumstances that the judge's failure to reach a lawful decision on the appellant's length of residence renders his decision unsustainable.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and that decision is hereby set aside. The appeal is remitted to the FtT to be reheard afresh, by a judge other than Judge Greasley.

No anonymity direction is made.

M.J Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
16 September 2020