Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00081/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 27 September 2017	**On 31 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR OLALEKAN AL-AWWAL OYEDEPO
(Anonymity direction not made)

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by RH & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Handley allowing an appeal on human rights grounds under Article 8.

2. The appellant before the First-tier Tribunal (hereinafter referred to as "the applicant") is 24 years old and a national of Nigeria. He appealed against a decision by the Secretary of State refusing him leave to remain. He has been residing in the UK since 2010, having come to the UK as a visitor on several occasions from 2007. In 2011 he was given limited leave as his father's dependant. His father had

leave as an offshore worker but was subsequently unable to renew this leave as he was working on a vessel rather than a fixed installation.

3. In 2015 the applicant's parents and sisters were given indefinite leave. It seems that at the time the applicant's family were granted indefinite leave the applicant was over 18 and did not satisfy the requirements of paragraph 276ADE of the Immigration Rules as he had not spent half his life in the UK. The Judge of the First-tier Tribunal noted that when the applicant's family first moved to the UK the applicant remained at boarding school in Nigeria until he completed his studies. Since the age of 17 he has been living in the UK with his parents and siblings. The judge found there was family life between the applicant and his family in the UK. The applicant has sickle cell disease which, although relatively mild, requires treatment and puts him at risk of infection. He receives support from his family to cope with this condition. He receives care and support from his parents, including preparing his meals and washing his clothes.

4. Permission to appeal was granted principally on the basis that the judge arguably did not have regard to the public interest requirement in s 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). The judge arguably erred in not making a finding on whether treatment for sickle cell disease would be available in Nigeria.

Submissions

5. In his submission Mr Matthews referred to a typographical error in the Secretary of State's grounds of appeal. The reference to s 117B(6) in the grounds should have referred just to s 117B. He submitted that no proper balancing exercise had been carried out by the Judge of the First-tier Tribunal. There was no regard to the cost to the public purse of treating the applicant's medical condition. He referred to the decision of the Supreme Court in Agyarko [2017] UKSC 11. Very compelling factors were required to show that there was family life between adults. Although there had been a delay of 4 years before the Secretary of State decided the applicant's application for leave to remain, this was caused neither by the applicant nor by the Secretary of State. It was caused by proceedings to clarify and establish the applicant's father's entitlement.

6. Mr Caskie, having regard to the decision of the Judge of the First-tier Tribunal, pointed out that the question of whether there was family life was a question of fact. It was addressed at paragraphs 24-28 of the decision. The judge carried out a careful analysis and was

entitled to find there was family life. The applicant's medical condition could be taken into account in relation to the existence of family life.

7. Mr Caskie accepted that the reference to s 117B(6), rather than s 117B, in the Secretary of State's grounds was a typographical error. In relation to s 117B, Mr Caskie pointed out that all the witnesses for the applicant had given evidence in English. The applicant' father had been in the UK for a long time. Although not fully independent the applicant was not a burden on the state. He had never been in the UK unlawfully. No argument was advanced on the basis of private life. It could be assumed the judge was aware that the public interest was a material factor.

8. Turning to Agyarko, Mr Caskie referred to a comment by Lord Reed at paragraph 52, which he submitted was to the effect that when a person was in the UK unlawfully the public interest was diminished by delay. It did not matter where responsibility for the delay lay. The delay in the present case had been significant.

9. Mr Caskie continued that although the decision of the First-tier Tribunal might have been written better, the judge's decision on proportionality, at paragraph 31, was based on all the circumstances.

10. Having heard Mr Caskie's submission, I informed the parties that I was satisfied the judge had made an error of law, in consequence of which the decision should be set aside. I proposed to re-make the decision on the basis of the evidence before the First-tier Tribunal. Mr Caskie asked for the appeal to be remitted to allow up-to-date evidence to be submitted and for the issue of delay to be further considered. Mr Matthews pointed out that no application had been made to submit new evidence. In the absence of any specification as to what fresh evidence of a material nature might be submitted, I was not satisfied that remittal was appropriate. I invited the parties to address me on the substantive issues in the appeal following an adjournment until later in the day.

11. When the hearing resumed I was addressed by Mr Caskie on the factual background to the appeal. He pointed out that when the applicant's father applied for indefinite leave, the significance became apparent that he worked on an emergency response and rescue vessel, not on a rig, or fixed installation, as required by the Secretary of State's policy on offshore workers. This resulted in an appeal by the whole family, which progressed through the Upper Tribunal as far as the Court of Session. The Court of Session proceedings were not completed, as by that time the applicant's father had completed ten years' lawful residence. The applicant's mother qualified under Appendix FM and the applicant's siblings

under paragraph 276ADE of the Immigration Rules. While the appeal was in progress the family had s 3C leave.

12. While in the UK the applicant studied for and graduated with a degree in Telecommunications and Electrical Engineering from Sheffield Hallam University. He had paid overseas student fees, as did one of his sisters, who had also studied from a university in the UK. Unlike his sister, the applicant had no route to settlement as a dependant. Mr Caskie confirmed that the Upper Tribunal had found against the applicant's father in his appeal prior to the application to the Court of Session.

13. Mr Caskie sought to distinguish the decision in Agyarko. That decision was concerned with people who were in the UK unlawfully, applying the approach of the European Court of Human Rights in Jeunesse (2015) 60 EHRR 17. The decision did not apply to someone who was here lawfully. The applicant had not breached any immigration law. The Judge of the First-tier Tribunal had found the applicant had family life in the UK and this was enough to make the applicant's position exceptional. It just so happened that owing to an accident of birth the applicant was over 18 when indefinite leave was given to the members of his family.

14. Mr Caskie continued that s 117B made a clear distinction between private and family life. Regard should be given to paragraphs 50-53 of the decision in Agyarko on the issue of whether the applicant's residence should be considered precarious. The applicant had never been here unlawfully and would complete 10 years' lawful residence next year. His family life should be given very considerable weight. The delay in deciding his application was material, in terms of paragraphs 51-52 of Agyarko. The applicant did not have to be financially independent - if the applicant was not being supported by his father, he could use his degree to obtain employment. There were exceptional circumstances outside the Immigration Rules. The applicant was 24 and had been in the UK since the age of 14. He had family life with his parents and siblings. The applicant's childhood and youth should be looked at together, in accordance with Maslov (2007) 47 EHRR 496.

15. Mr Matthews made a submission on behalf of the Secretary of State. He too referred to the factual background. He pointed out that the applicant would not complete 10 years' residence in 2018 as he had been residing in the UK only since 2010. Before that he had come to the UK as a visitor and it was in this capacity he entered in 2010. Mr Matthews acknowledged the applicant had not been in the UK unlawfully and that he had benefited from s 3C leave. The applicant had studied in Sheffield and during this time he was away from his family in Scotland. There was provision for adult dependants in Appendix FM. The assessment of

proportionality outside the Rules carried out by the Judge of the First-tier Tribunal did not reflect public interest considerations.

16. Mr Matthews submitted that the delay in this case was not attributable to anyone. There was a complex history with a number of applicants and appeals. The applicant had the opportunity of tertiary study in the UK. At no point had either the applicant or his family had the expectation of remaining permanently in the UK. This was not the type of precarious case which was considered in Agyarko but the applicant's position was nevertheless precarious. The applicant had been in the UK for 7 years from the age of 17. There was no evidence that treatment for the applicant's medical condition would not be available in Nigeria. The applicant's father supported the applicant in the UK and, if necessary, could pay for the applicant's treatment in Nigeria. In relation to family life, although this was found to exist, that applicant was now 24 and would be making his own way in life. There was nothing compelling to displace the public interest under s 117B.

17. In response, Mr Caskie submitted that the applicant was given leave as a dependant in 2010. This leave continued until 2012. Regard should be given to the family's immigration history. There had been an enormous delay in resolving the applicant's position. The applicant's home was still with his parents while he was at University. The decision in Agyarko was concerned with someone in the UK unlawfully. This was different from the applicant. If the applicant had to leave the UK his family life would be ruptured. His Article 8 claim was sufficiently strong to outweigh the public interest. There were very strong and compelling factors and the applicant had always abided by the Immigration Rules. His removal would be disproportionate.

Discussion

18. It is clear that the Judge of the First-tier Tribunal erred in law by failing to give adequate reasons to support the outcome of the balancing exercise under Article 8. Mr Caskie suggested that finding of the existence of family life was itself sufficient to show something exceptional to outweigh the public interest. This is not so. The finding of the existence of family life was required in order for Article 8 to be engaged but it would not, without more, lead to a finding that the refusal of leave was disproportionate. Not only should the judge have given reasoning to support such a finding, the judge was required to have regard to those factors set out at s 117B, so far as relevant, and, in particular, the public interest in the maintenance of immigration control, set out in s117B(1). It might not have been necessary for the judge to refer to the statute provided it was clear that the judge had directed his mind to the relevant matters. The lack of reasoning in relation to proportionality

means that the reader of the decision cannot be satisfied that the judge so directed himself, particularly with regard to the public interest. It is the decision on proportionality which now requires to be re-made, on the basis of the findings by the First-tier Tribunal.

19. It is not disputed that the family has acted in accordance with the law and has sought to comply with the Immigration Rules. The family sought to ensure that the applicant's education was not disrupted by allowing him to complete his schooling in Nigeria before coming to the UK. In this country the applicant has been successful in obtaining a university degree. Mr Matthews pointed out that the degree was from a university in Sheffield while the applicant's family remained living in Scotland. Mr Caskie implied that while studying the applicant's home was still in Scotland. I have no evidence on how much time the applicant spent in Sheffield but it has not been suggested the degree was obtained by distance learning. Accordingly it is reasonable to assume the applicant had sometimes to attend the university in Sheffield. It does not follow from this that the judge's finding as to the existence of family life was wrong. It does, however, give some weight to Mr Matthews' suggestion that now the applicant is over 24 it was reasonable to assume he would start to go his own way in life.

20. Each party referred me to the Supreme Court decision in Agyarko. Mr Caskie made the point that this applicant has not been in the UK unlawfully, unlike the position of the persons under consideration in Agyarko. I note that the decision in Agyarko is expressed in terms of the correct approach to the application of Article 8 to non-settled migrants, which would include this applicant. Paragraphs 41 and 60, in particular, of the decision show the importance of applying a structured approach to proportionality to persons in this category. Consideration of the public interest is an important aspect of this approach. Although the applicant has not been in the UK unlawfully, his position has always been precarious in the sense that he was entitled to remain in the UK only temporarily, as mentioned at paragraph 51. The applicant in this appeal entered the UK on the most recent occasion in 2010 as a visitor, as he had done before, and was granted limited leave as the dependant of a work permit holder. It appears that owing to the dubiety over the applicant's father's status as an offshore worker, there was no likelihood that the applicant's father would have obtained indefinite leave on this ground. Instead the lengthy proceedings over the father's status petered out when he was granted indefinite leave on the basis of 10 years' lawful residence. The other members of the family, apart from the applicant, were then able to rely on the father's status to obtain indefinite leave. Unfortunately for the applicant and for his family the circumstances of the applicant were such that he could not benefit from paragraph 276ADE of the Immigration Rules. Mr Caskie sought to characterise

this as an accident of birth but in family issues under the Immigration Rules the line between childhood and adulthood may be cruial, as in this case, to a person's entitlement.

21. Mr Caskie looked to the European Court of Human rights in Maslov to show that the distinction between childhood and youth can be blurred and there can be a slow progression to adulthood. While in many families that seems likely to be the case, it does not alter the terms of paragraph 276ADE in terms of which the applicant found himself treated differently from his siblings. It does not follow from this that the outcome for the applicant under the Immigration Rules was disproportionate or even simply unfair. Furthermore, decisions of the higher courts have made it clear that the consideration of Article 8 outside the Rules should not be used for the purpose of circumventing those Rules.

22. On the question of delay, the position in Agyarko is more nuanced than Mr Caskie appeared to suggest. The point is made in paragraph 52 that the public interest in removal is likely to diminish where there is protracted delay. The diminution of the public interest does not mean that the public interest is outweighed by the right to respect for family life in every instance of protracted delay. Here the delay took place while the family was testing the interpretation of the Immigration Rules through appeal proceedings. The members of the family, including the applicant, should have been aware that a negative outcome would lead to all or some members of the family losing their entitlement to remain in the UK. Delay was in integral part of the family's attempt to establish rights to remain. Furthermore, it seems that the applicant was able to use at least part of the delay to his advantage to further his education.

23. As is pointed out at paragraph 57 of Agyarko, family life having been found to exist, a very strong or compelling claim is required to outweigh the public interest in the maintenance of immigration control. I have already referred to Mr Caskie's suggestion that a finding of the existence of family life is itself so exceptional as to show that the public interest was outweighed. This is not the case, as I have already indicated. The existence of family life is needed to show that Article 8 is engaged and, as Mr Matthews acknowledged, factors going to the existence of family life may themselves be relevant to the balancing exercise. A finding that family life exists with his parents and siblings, however, even in the case of a 24-year-old graduate, is not sufficient to show that the refusal decision is disproportionate.

24. One factor to be taken into account is the applicant's medical condition. As Mr Matthews pointed out, however, there is no evidence that treatment is not available for this in Nigeria. Indeed, as the applicant lived in Nigeria for the first 17 years of his life, it seems likely that treatment is available. It has never been

suggested that the applicant came to the UK to receive treatment that was not available in Nigeria, and if such a suggestion had been made it would have put a different complexion on the applicant's intentions. Mr Matthews suggested that the cost of treatment was an factor adverse to the applicant in the balancing exercise. It needs to be taken into account though that the applicant has been here lawfully as a dependant and paid fees as an overseas student. In this context the cost of any ongoing treatment for a relatively mild form of this condition would be unlikely to swing the balance one way or another.

25. The sad position of the applicant is that his circumstances show nothing in the way of a compelling factor or factors to outweigh the public interest in maintaining effective immigration control. While the applicant has until now been nurtured by his family he is a young adult with a good educational qualification. Mr Caskie submitted that to require the applicant to leave the UK would "rupture" life with his family. Mr Matthews suggested that at his age the applicant might reasonably be expected to start making his own way in life. Of these two different expectations for the applicant's future the one proposed by Mr Matthews would seem more likely to follow from the facts as they exist. The applicant has already started demonstrating his ability to develop independence by securing an education at boarding school in Nigeria and then at university in the UK. If he returns to Nigeria he will do so as a well-qualified young man with the support of a close family. There seems no reason why emotional and financial support would necessarily end when the appellant leaves the UK.

26. In the circumstances of this appeal there is only one feasible outcome to the balancing exercise under Article 8. The refusal of leave is not disproportionate when the applicant's circumstances are weighed against the public interest.

Conclusions

27. The making of the decision of the First-tier tribunal involved the making of an error on a point of law.

28. The decision is set aside.

29. I remake the decision by dismissing the appeal.

Anonymity

The First-tier Tribunal din not make an anonymity direction. I have not been asked to make such a direction and I see no reason of substance for doing so.

Fee award (N.B. This is not part of the decision)

The appeal is dismissed so no fee award can be made.

Deputy Upper Tribunal Judge Deans 27th September 2017