IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34576/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 December 2014	**On 31 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RISIQAT BOLANIE SALAMI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery of the Specialist Appeals Team
For the Respondent: No appearance

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as the Applicant is a citizen of Nigeria, born on 28 December 1965. On 6 July 2005 she arrived with leave as a short-term student. Her student leave was extended on several occasions and finally expired on 17 September 2012. On 10 September 2012, in time, the Applicant

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applied for further leave to remain as a Tier 1 (Entrepreneur) Migrant under the Points-Based System.

2. On 12 August 2013 the Appellant (the SSHD) refused the application on the basis that the Applicant did not meet the requirements of paragraph 245DD(b) and Appendix A (Attributes). She had not provided the evidence specified under paragraph 41-SD of Appendix A of the Immigration Rules to show she had access to the requisite funds. The SSHD also found she had not shown she had sufficient disposable funds under Appendix A. The Respondent proposed to make directions under section 47 of the Immigration, Asylum and Nationality Act 2006 for her removal to Nigeria.

The First-tier Tribunal's Determination

3. By a determination promulgated on 26 September 2014 Judge of the First-tier Tribunal Griffith dismissed the Applicant's appeal under the Immigration Rules and allowed it on human rights grounds by way of reference to Article 8 of the European Convention.

4. The Judge found the Applicant had not been properly advised about the requirements of paragraph 41-SD of the Rules and although the documentation she had submitted did not comply with the Rules there was nevertheless clear evidence subsequent to the application that the Applicant had access to some £200,000. In addition the Applicant's signature was missing from the declaration contained in a letter of 15 August 2012 and there was no letter from her solicitors confirming the validity of the signatures. The firm was no longer in a position to rectify the omission since it had become the subject of an intervention by the Law Society.

5. The Judge noted the Applicant who was unrepresented at the hearing before her did not pursue a claim under Article 8 of the European Convention although I see reference was made to it in the Grounds of Appeal lodged under Section 82 of the 2002 Act. However the Judge went on to consider the claim on the basis that she had to decide whether the decision under appeal amounted to a breach of the Applicant's right to a private life protected by Article 8 of the European Convention.

6. The Judge noted the Applicant could not satisfy the requirements of paragraph 276ADE of the Immigration Rules and she still had ties to her home country. Her father still lived there and sent her an allowance and her proposed business was for the distribution or sale of Nigerian foods. There was no evidence before the Judge of any family life in the United Kingdom.

7. At paragraph 30 the Judge noted the Applicant had previously always complied with the requirements of the Immigration Rules; that she evidently had capital at her disposal and that she had already spent money to take a lease of premises from which she intended to conduct her business. Accordingly, the Judge found there were no reasons why the public interest

would be disproportionately disadvantaged if the Applicant were permitted to remain in the United Kingdom to pursue her commercial activities.

8. Mr Avery relied on the Grounds for Appeal. He referred to *Patel and Others v SSHD [2013] UKSC 72*in which it was held that Article 8 of the European Convention was not to be used as a general ground for dispensing with compliance with the Immigration Rules. The Judge's treatment of Article 8 in her determination, even though the Applicant did not pursue it, was in error and that part of the determination should be set aside. He invited me to proceed with the substantive appeal and dismiss it for the same reasons.

Error of Law Consideration

9. The Judge properly referred to the judgment in *R (oao Razgar) v SSHD [2004] UKHL 27* and set out the questions which she needed to address. In assessing the proportionality of the SSHD's decision the Judge did not identify the legitimate public objective referred to in Article 8(2) by which she went on to assess whether the SSHD decision was disproportionate to the public interest. She gave weight at paragraph 30 of her determination to the facts the Applicant had complied with the Immigration Rules since her arrival in 2005 and that fees for education had been paid. This does not take into account what was said in *Nasim and Others (Article 8) [2014] UKUT 00025* that a person's human rights are not enhanced by not committing criminal offences or not relying on public funds.

10. The Judge at paragraph 27 considered that the Applicant had probably been not been well served by her solicitors and that such advice had led to her failing to meet all the requirements of the Immigration Rules in relation to the evidence and documents required to support her Tier 1 (Entrepreneur) Migrant application. The Judge went on to say the case did not amount to a "near-miss". The fact the Applicant did not lodge the requisite documentation with her application but if she had she would have met the requirements of the Immigration Rules does amount to a "near-miss". Whether the failure was due to poor legal advice or for some other reason does not change the position that the failure was not other than a near-miss although it may explain how the near-miss came about.

11. The Judge addressed the nature of the public interest as explained in Section 117B of the 2002 Act perfunctorily at paragraph 31 of her determination. The Judge had found the Applicant was dependent on her brother and her father. There was no reference to any business plan or a finding that the Applicant would be financially independent: see Section 117B(3). Other than the fact the Applicant had been studying for a very considerable period of time, and intended to set up in business, there was no evidence or reference to the Applicant's private and family life in the United Kingdom. The Judge erred in not taking these matters into account. For these reasons the determination of the First-tier Tribunal contained an error of law such that it should be set aside.

12. Notice of the hearing to the Applicant also gave notice that if she or her representative did not attend her appeal might be determined in her absence. I was satisfied that the Applicant had been given adequate opportunity to appear before the Upper Tribunal to present her case.

13. The documentary evidence before the First-tier Tribunal and the Upper Tribunal was limited. There were various bank statements relating to the funds of £200,000 and their whereabouts, evidence of incorporation of a company and bank statements for the company, as well as evidence of the company's acquisition of leasehold premises. There was no evidence to show the Applicant's role or investment in the company. There was no evidence other than that already referred to of her private and family life in the United Kingdom.

The Standard and Burden of Proof

14. The standard of proof is the civil standard, that is on the balance of probabilities. The burden is on the Applicant. The part of the appeal being considered relates only to a claim under Article 8 of the European Convention outside the Immigration Rules so account may be taken of evidence of matters subsequent to the date of decision or which is produced subsequent to the date of the initial application leading to the decision under appeal. Evidence of matters subsequent to the date of decision may be taken into account. There is no material evidence submitted at any time other than that to which I have already referred.

Disposal

15. Keeping in mind the judgment in *R (oao Oludoyi) v SSHD IJR [2014] UKUT 00539 (IAC)* I adopt the approach to appeals on grounds of Article 8 in accordance with the jurisprudence which comes from Strasbourg and from *Huang* and subsequent judgments which were summarised at paragraphs 7-12 of *EB (Kosovo) v SSHD [2008] UKHL 41*. I accept that by reason of the Applicant's presence in the United Kingdom since 2005 she will have established a private life. There was no evidence of any family life, despite references to a brother. The removal of the Applicant would amount to an interference with her private life but given that she has failed to meet the requisite requirements of the Points-Based System in the Immigration Rules and there was limited, if any, evidence of any other private life in the United Kingdom, I do not find that the interference would be of such gravity as to engage the United Kingdom's obligations under Article 8 of the European Convention. Consequently, the claim under Article 8 must fail.

Anonymity

16. There was no request for an anonymity order or direction and having considered the documents in the Tribunal file and decided the appeal I find that none is warranted.

NOTICE OF DECISION

The determination of the First-tier Tribunal contained an error of law in its treatment of the Applicant's claim under Article 8 of the European Convention outside the Immigration Rules such that that part of it is set aside. The following decision is substituted:

The appeal of the Applicant is dismissed on human rights grounds (Article 8).

The appeal to the Upper Tribunal of the SSHD is allowed.

Signed/Official Crest Date 31. xii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE SSHD: FEE AWARD

The appeal of the Applicant has been dismissed so there can be no fee award.

Signed/Official Crest Date 31. xii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal