IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32070/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 8th April 2015	**On 17th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS SAULAT ADELARIN YUSUFF
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Olubisose (Solicitor)
For the Respondent: Mr S Kandola (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Napthine, promulgated on 31st December 2014, following a hearing at Hatton Cross on 4th December 2014. In the determination, the judge allowed the appeal of Mrs Saulat Adelarin Yusuff. The Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female citizen of Nigeria who was born on 8th October 1949. She appealed against the decision of the Respondent dated 25th July 2014, refusing her application for leave to remain in the UK under Article 8 ECHR on the basis of her family and private life. There is also a decision dated 31st July 2014 for removal of the Appellant.

The Judge's Finding

3. The judge heard evidence from the Appellant's four children and from one of her grandsons, that she had visited the UK a number of times prior to her last visit in 2005, when she came to see her children, and because of events which occurred during that visit, she was unable to return to Nigeria. She had ceased to work in 2001. She was living with her husband. All her children had migrated to the UK. They were settled there with their families. However, at some point her husband found another woman and that woman moved into the matrimonial home (see paragraphs 16 to 17). It was in these circumstances that the Appellant arrived in the UK in 2005, and claimed to have no home to return to, and no social or financial support in Nigeria. She had been supported by her children ever since her arrival. She had not been a charge on the state. She had suffered some ill health, largely depression over the last three years, but also a broken leg from a fall. She is now 65 years of age and cannot rebuild her life back in Nigeria. Moreover, she is living in the midst of her family in the UK with their love and support both emotional and practical as well as financial (paragraph 23).

4. The judge found that the Appellant could not meet the requirements of paragraph 276ADE. She did have two brothers still living in Nigeria as well as cousins and families. She was not without ties there. It is true she had been involved in the life of a church in this country but "the Appellant would find a church in Nigeria which would welcome her as a member" (paragraph 34). She spoke English and another Nigerian language. It is true that she had spent ten years in the UK but she spent 55 years of her life in Nigeria. She also had family in Nigeria and no doubt friends there (paragraph 35).

5. With respect to Article 8, the judge gave consideration to Section 117B of the 2014 Act with respect to the public interest considerations that applied in a case such as this. It was observed that there had to be particularly close links between adult children and their parents as had been established by **Kugathas [2003] EWCA Civ 31** (see paragraph 52 of the determination).

6. In the case of **ZB (Pakistan) [2009] EWCA Civ 834**, it was said that the Appellant's close family was in the UK and she "is wholly or, largely dependent upon her sons in the UK for financial assistance" as well as being dependent upon the family for her day-to-day care. In that case Aikens LJ stated (at paragraph 47) that "the focus is on the parent, the issue must be: how dependent is the older relative on the younger ones in

the UK and does that dependency create something more than emotional ties?" (see paragraph 53 of the determination).

7. It was in this context, that the judge held that:

> "This Appellant is wholly financially dependent upon her children in the UK. She has lived with one or another of them since her arrival in September 2005. She has been totally dependent upon them for her accommodation and maintenance. She has no other source of income." (See paragraph 54)

8. The judge went on to hold that:

> "She is very involved in her children's family lives, looking after grandchildren and entry into Qotidian family life. She has rendered such assistance since she came to the UK as a visitor in 2005. It was not her intention to remain, however, whilst here it became apparent that her husband had found a new woman to share his life with and he had moved her in to take the Appellant's place." (Paragraph 58)

9. A feature of this appeal was that Mr Hurley, who appeared on behalf of the Respondent Secretary of State, had made it quite clear that "the Appellant does appear to be financially dependent on her children" and that "the Home Office position is that the proper application should be made and an application should be made outside the UK. The Appellant should go back to Nigeria and make an application" (see paragraph 60).

10. It was in these circumstances, that the judge referred to **Chikwamba [2008] UKHL 40**. In **Hayat (Pakistan) [2011] UKUT**, a further refinement was added to **Chikwamba**. It was now made clear that:

> "In appeals where the only matter weighing on the Respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the Immigration Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the Appellant's side of the balance."

The judge expressly referred to this principle (at paragraph 61) with its relevance that the principle is not confined to an Appellant seeking to remain with someone who has settled status in the UK.

11. Yet, the judge was equally clear that the Appellant did not have any serious health issues as to engage Article 3 ECHR, and that she suffered from depression and had some physical impairment, but this was not major (see paragraph 62).

12. Given this background, that the judge concluded that it would not be reasonable to remove the Appellant in order for her to apply from outside the UK because, "she has no-one to support her in Nigeria, she has no place to live in Nigeria, she would be largely left alone to fend for herself whilst awaiting the outcome of any application" and that "there is no certainty" that any of her relatives there would render her with meaningful assistance (see paragraph 63). As against that unpredictability in Nigeria, her situation in the UK was that "all of her needs are catered for with the

financial assistance offered by her family and the home she has with her son and his family" (paragraph 64).

13. This led the judge to enquire rhetorically, "what would be the purpose in sending this somewhat vulnerable 65 year old woman back to Nigeria simply to apply for entry clearance as a dependent relative?" (paragraph 65). The judge asked this question in the light of Mr Hurley's clear acceptance that, "the Appellant does appear to be financially dependent on her children" (see paragraph 66). The **Razgar** principles would then apply (paragraph 67) and the appeal was allowed under Article 8.

Grounds of Application

14. The grounds of application state that the judge misconstrued the import of **Chikwamba** and has "embarked on a freewheeling Article 8 analysis, unencumbered by the Rules" (see **Gulshan [2013] UKUT 640**).

15. On 11th February 2015, permission to appeal was granted.

16. Thereafter, a Rule 24 response was entered by those representing the Appellant.

Submissions

17. At the hearing before me on 8th April 2015, Mr Kandola, appearing on behalf of the Respondent Secretary of State, stated that he would fundamentally rely upon Ground 2 of the application in that the judge had failed to direct himself to the relevant test outside the Rules, namely, that compelling circumstances would be required before an appeal could be allowed. He also, however, stated that the judgment in **Chikwamba** had been misunderstood because that judgment only applied in cases where an applicant stood to succeed under the Immigration Rules in an in-country appeal, but was then being asked to go abroad, simply in order to make an application, which would in any event otherwise have succeeded. This was not the case here. The Appellant could not succeed under any of the Immigration Rules.

18. For his part, Mr Olubisose submitted that the judge did take everything into account, and made proper findings of fact in relation to all matters that were in issue, and the determination went far wider than simply the application of the **Chikwamba** principle that a person could not be required to go overseas simply in order to make an application to re-enter. One only had to look at the wide ranging Article 8 findings that the judge had made here.

19. In reply, Mr Kandola submitted that the reference to **Chikwamba**, in a way in which it was wholly unwarranted, had tainted the Article 8 analysis, such that the only proper course of action was to make a finding of an error of law, and to remit the matter back to the First-tier Tribunal for a redetermination.

No Error of Law

20. I am satisfied that the making of the decision by the judge does not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, although **Chikwamba** is referred to, the judge does not do so in the context of suggesting that because a rule of law cannot be met through an in-country appeal by the Appellant, it would be wrong to ask her to apply from her country of origin by returning there. Rather, the judge uses the case of **Chikwamba**, to draw attention to the principle that, even where the Secretary of State has a "legitimate objective" this "will usually be outweighed by factors resting on the Appellant's side of the balance" in an appropriate case (see paragraph 61).

21. It is the Appellant's case that the Appellant should return to Nigeria and apply from there because it is Mr Hurley, who appeared on behalf of the Respondent, who maintained that, though the Appellant was financially dependent on her children, the appropriate course of action for her was to make an application from abroad. What the judge bases the decision on are the following factors. First, that it is not reasonable to remove the Appellant.

22. Second, that there is no-one to support her in Nigeria. Third, she has no place to live in Nigeria. Fourth, she would be largely left alone to fend for herself. And fifth, that there is no certainty that anybody there could render her with meaningful assistance (see paragraph 63). The judge then contrasts this with the situation that the Appellant enjoys in the UK and observes that this is "where all of her needs are catered for with the financial assistance offered by her family and the home she has with her son and his family" (paragraph 64). It is only in this context that the judge asks the rhetorical question, "what would be the purpose of sending this somewhat vulnerable 65 year old woman back to Nigeria simply to apply for entry clearance as a dependent relative" (paragraph 65).

23. The fact is that the Appellant can succeed on Article 8 grounds in any event, and this is a second reason that the judge gives for allowing the appeal, which exists entirely independently of any **Chikwamba** principle.

24. Secondly, the reason why the judge ultimately allows the appeal is because of Article 8. The judge refers to **ZB (Pakistan) [2009] EWCA**, and notes that, as in that case, this is an Appellant who is "wholly, or largely dependent upon her sons in the UK for financial assistance", and that in such a case, "the focus is on the Appellant, the issue must be: how dependent is the older relative on the younger ones in the UK and does that dependency create something more than emotional ties?" (See paragraph 53).

25. This, of course, is an application directly of the "**Kugathas** principle", which the judge refers to at paragraph 52. In this regard, the judge's findings are quite clear again. He observes that, "this Appellant is wholly

financially dependent upon her children in the UK. She has lived with one or another of them since arrival in 2005. She has been totally dependent upon them …" (paragraph 54).

26. The judge goes on to say that "she is involved in the children's family lives, looking after grandchildren …" (paragraph 58). It is therefore, in this context that the judge allows the appeal on the basis of freestanding Article 8 rights, after observing that the Appellant could not succeed under the Immigration Rules, and after applying the Section 117B consideration in terms of the public interest considerations (see paragraphs 43 to 45). In short, the determination is clear, comprehensive, and one that was entirely open to the judge to make.

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 15th April 2015