Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36684/2014

**THE IMMIGRATION ACTS**

Heard at Field House, London
On the 23rd November 2015

Decision & Reasons Promulgated
On the 18th December 2015

**Before:**

DEPUTY JUDGE OF THE UPPER TRIBUNAL MCGINTY

**Between:**

MS YETUNDE SARAT SHITTU
(Anonymity Direction not made)

**Appellant**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Respondent**

**Representation:**
For the Appellant: No attendance
For the Respondent: Mr Bramble (Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Scott dated the 10th May 2015, but promulgated on the 14th May 2015, in which he dismissed the Appellant's appeal under paragraph 245CA of the Immigration Rules and under Article 8 of the ECHR, on human rights grounds.

2. Within the Grounds of Appeal it is submitted that:

"1) The Home Office Respondent did not turn up on the 27th March 2015 for the hearing.

2) The Judge did not have enough evidence to work with, because no correspondence was sent to the judge prior to the hearing date by the Home Office. He had to rely on the limited document I had which I believe was not enough to get the desired reply.

3) On these grounds I believe my human right was not fully considered."

3. Permission to appeal was granted by Judge of the First-tier Tribunal Hollingworth on the 23rd July 2015 on the basis that the Judge had referred to the Appellant submitting a large bundle of papers which had been returned to her the previous day by her former representatives, which was said to include the Home Office appeal bundle sent to her in October 2014. The Judge had continued by stating that the Tribunal file contained no Respondent's bundle but with the Appellant's consent the Judge retained those papers and he had duly considered them. Judge Hollingworth found that on the basis of the wording employed by the Judge at paragraph 9 it was unclear whether the original Home Office bundle was available to the Judge or not and that the Appellant was entitled to proceed on the basis that the Respondent would make available to the Judge all those papers which have been submitted in association with her application and that an arguable error of law had occurred.

4. In the Respondent's Rule 24 reply it is argued that the First-tier Tribunal Judge directed himself appropriately and that it was clear that the Judge did have access to all of the relevant papers and that the Respondent's bundle was available via the Appellant. It is argued that the clear finding at paragraph 10 meant that the Appellant could not succeed under the Immigration Rules and that the Judge had considered that the refusal of the Appellant's application was not such as to engage Article 8, which it was argued was open to him.

5. It was on this basis that the appeal came before me on the 23rd November 2015. The case was listed for hearing at 2 p.m. and a Notice of Hearing was sent to the Appellant at her home address on the 5th November 2015, by first class post, notifying her that the appeal would be heard on Monday 23rd November 2015 at 2:00 p.m. at Field House, 15 Breams Buildings, London, EC4A 1DZ. However, by 2:40 p.m., no one had attended on behalf of the Appellant, nor had the Appellant herself attended. I noted that there was no representative or sponsor marked on the file. No explanation had been given for the Appellant's non-attendance, and no request had been sent to the Tribunal asking for an adjournment. My clerk also checked to ensure that there had been no notification sent to the Tribunal regarding any change of address on behalf of the Appellant, and a tannoy was put out to ensure that she was not present somewhere else within the building. The tannoy was not responded to.

6. In such circumstances, I was satisfied on the balance of probabilities that the Appellant had been notified of the hearing, having been sent the Notice of Hearing by first class post on the 5th November 2014, some 18 days before the hearing was due to take

place today on the 23rd November 2015, or that reasonable steps had been taken to notify the Appellant of the hearing. I further consider that it was in the interest of justice to proceed with the hearing in the absence of the Appellant, given the lack of any explanation for her failure to attend, despite having been notified of the hearing.

7. I therefore heard submissions from Mr Bramble on behalf of the Respondent. He submitted that it is clear that in fact First-tier Tribunal Judge Scott at [9] of his decision, had made it clear that the Appellant had handed up the Home Office bundle which had been sent to her in October 2014 which he had retained and duly considered and that therefore all of the requisite documentation had been submitted up to the First-tier Tribunal Judge, despite the absence of the Respondent at that hearing. Mr Bramble submitted that the findings of the First-tier Tribunal Judge regarding the Appellant not being able to meet the requirements of paragraph 245 CA of the Immigration Rules (since deleted) were correct, in that in order to be able to qualify for Leave under paragraph 245 CA, the Appellant must have had or have been last granted entry clearance, Leave to Enter or Remain, as a Tier 1 (General) Migrant: a Highly Skilled Migrant; a writer, composer or artist; or as a self-employed Lawyer. The Appellant in this case, as was stated by the First-tier Tribunal Judge at [11] had been granted Leave to Remain as a Tier 1 (Post-Study) Migrant, so that she could not fall into any other relevant categories.

8. However, Mr Bramble did indicate that there may be an error in the manner in which First-tier Tribunal Judge Scott dealt with the question of Human Rights under Article 8, in that he submitted that the Judge simply set out the 5 stage test in Razgar but had then failed to set out whether in fact the Appellant did have a family or private life in the UK and had simply stated "having done so, I can find no basis for holding that the Appellant's removal would be an interference with her right to respect for her private and family life. I conclude, therefore, that the appeal on this ground fails at the first Razgar question". He further considered that the reasoning of the Judge in this regard was inadequate. However, Mr Bramble submitted that even though there was a possible error in the way that the Judge had considered Article 8, it was immaterial and did not amount to a material error such as to set aside the decision. He argued that it had been clear from the evidence recorded by First-tier Tribunal Judge Scott at [8] and [9] that the Appellant simply considered herself to be a Highly Skilled person who thought that she would be allowed to switch into the Tier 1 (General) category and that she had worked and studied in the country and wanted the chance to continue what she started and to be the professional she was trained to be. However, Mr Bramble argued that this was insufficient to enable her to swap categories under paragraph 245 CA and it was also insufficient to render the decision taken disproportionate for the purposes of the fifth stage of the Razgar test. On the basis that there was no material error of law, he submitted that the appeal should be dismissed if I was not minded to adjourn the appeal, given the Appellant's non-attendance.

My Findings on Error of Law and Materiality

9. Although the Respondent did not attend at the hearing of the First-tier Tribunal appeal on the 27th March 2015, I find that the wording of First-tier Tribunal Judge Scott at [9] is perfectly clear. At paragraph 9 First-tier Tribunal Scott stated specifically "the

Appellant submitted a large bundle of papers which had been returned to her the previous day by her former representative. Those papers included the Home Office appeal bundle which was sent to her in October 2014. The Tribunal file contains no Respondent's bundle. With the Appellant's consent, I retained those papers and duly considered them". This paragraph makes it clear that although there was no Respondent's bundle on file, the Appellant had been sent the day before by her former representatives, the Home Office appeal bundle, which had been sent to the Appellant in October 2014. This bundle is on the file. This was a voluminous bundle and did contain all of the documents and associated attachments initiated from the Appellant apart from the appeal form and included all of her bank statements, online purchases, purchase documentation, payslips, investment account letters and the original decision.

10. The fact is that the Judge was handed that bundle by the Appellant at the hearing which he retained and duly considered as stated by him at [9]. It did not have to be handed up by the Respondent, as it was handed up by the Appellant and duly considered. There is no evidence within the Grounds of Appeal as to any further documents which were not contained within that bundle which in fact had been submitted by the Appellant to the Respondent that were relevant to her claim under Article 8 or under the Immigration Rules. It is also clear that she could not meet the requirements of the Rules in any event, as she was not within the required category of persons who could qualify for Leave under paragraph 245 CA, she having previously had leave as a Tier 1 (Post-Study) Migrant. Her appeal was therefore properly rejected under the Immigration Rules.

11. Her appeal then fell to be considered on Article 8 grounds, the Judge having properly found that she could not succeed under the Immigration Rules. There is no evidence before me that as a result of the Appellant handing up the Respondent's bundle as opposed to it having been submitted by the Respondent herself, that this actually meant that there was any documentation not considered by the Judge which would have otherwise been relevant to the appeal. I find that all of the relevant evidence within the Respondent's bundle was handed up by the Appellant at the appeal hearing and that the Judge fully took account of all of the relevant evidence.

12. However, I do find that the Appellant's human rights were not fully and properly considered by First-tier Tribunal Judge Scott. Although Judge Scott having dismissed the appeal under the Immigration Rules went on to consider the case on Human Rights outside of the Immigration Rules and had set out the 5 stage test in Razgar [2004] UKHL 27 he then simply stated " Having done so, I can find no basis for holding the Appellant's removal would be an interference with her right to respect for her private and family life. I conclude, therefore, that the appeal on this ground fails at the first Razgar question". This finding by First-tier Tribunal Judge Scott is unclear as to whether or not in fact the Appellant actually had any private or family life in the UK and is inadequately reasoned as to the findings made. Insufficient reasons are given in respect thereof and an inadequate consideration was given to this aspect of the appeal.

13. However, from the file there was also no Appellant's bundle before First-tier Tribunal Judge Scott and the extent of the documentation that he had was the Respondent's bundle handed up by the Appellant. Significantly, there was no statement

from the Appellant and no evidence before the First-tier Tribunal Judge of her having any family in the UK. Further, although as First-tier Tribunal Judge Scott found the Appellant had arrived in the UK in February 2011 as a Tier 4 (General) Student Migrant and was subsequently granted Leave to Remain as a Tier 1 (Post-Study) Migrant until the 15th August 2014 when she then applied on the 14th August 2014 for Leave to Remain as a Tier 1 (General) Migrant, that was the extent of her time in the UK, namely just over 4 years as at the date of the decision. The only evidence recorded by First-tier Tribunal Judge Scott from the Appellant in respect of her oral evidence, which accords with his note of the evidence given by her at [8] was that she considered herself to be highly skilled and thought that she will be allowed to switch into the Tier 1 (General) Migrant category and that she had worked and studied in this country and wanted the chance to continue what she had started and to be the professional she was trained to be. That was the extent of her oral evidence regarding her human rights under Article 8.

14. Without any evidence of the Appellant having a family in the UK, there could be no breach of any right to a family life in the UK, and the issue therefore simply became whether or not the decision was in breach of her right to private life. In this regard it was relevant that the Appellant simply gave evidence that she had been working and studying in the UK and wanted effectively the chance to continue. However, it is clear that she had been studying and working in the UK under the terms of the previous visas that she had been granted, and those visas had simply come to an end. She not being in a position to swap categories under paragraph 245 CA, there is no further evidence from the Appellant as to why the decision taken was disproportionate. Appellants do not simply have the right to continue working in the UK after the period of their visas have expired. There is no specific right to work in the UK, for there to be a breach of human rights in respect of private life, what is necessary to establish is that the Appellant does have a private life in terms of the relationships in terms of friendships etc. and activities undertaken by her which constitute private life. No evidence was given by the Appellant in this regard, simply that she wished to carry on working and to be the professional she was trained to be. Having been in the UK for four years she would have formed some private life, but there was no evidence as to the quality or nature of that private life.

15. It is also relevant that although the First-tier Tribunal Judge had failed to consider Sections 117 A-D of the Nationality, Immigration and Asylum Act 2002, that in respect of her earnings the Appellant was earning £346.76 net per week, being £18,021.12 per year net, such that she would be self-sufficient, and given the Appellant was from Nigeria and gave evidence in English, that she would have been able to speak English and would therefore be in a position to integrate into society and be self-sufficient.

16. However, in light of the lack of evidence regarding her family or private life in the UK, but simply evidence that she wished to continue working after the end of her visa period, there was no evidence before the First-tier Tribunal Judge such as to mean that the Judge would have been in a position to find that the decision reached was disproportionate to the legitimate public aim sought to be achieved of maintaining an effective immigration control and for the protection of the rights and freedoms of others. Given that the Appellant's human rights claims would therefore have been dismissed in any event on the decision that there was no evidence that the decision taken was

disproportionate to the legitimate public aims end sought to be achieved, the error of First-tier Tribunal Judge Scott in the way that he considered the Article 8 issue outside of the Immigration Rules was not material. Given that the error in this regard was not material, and there being no material error of law, the decision of First-tier Tribunal Judge Scott is maintained.

17. However, even if I am wrong in this regard and there was a material error and I had gone on to consider remaking the decision, again I would have found that the Appellant had not proved that she had any family in the UK and that other than her desire to continue working, she had not proved what private life she had in the UK such as to render the decision disproportionate to the legitimate public end of maintaining the protection of the rights and freedoms of others by ensuring that those whose visas have finished, return home, and would have so found, even bearing in mind that fact that the Appellant is self-sufficient and able to speak English for the purposes of Section 117 A-D of the Nationality, Immigration and Asylum Act 2002. Therefore, even if I had been deciding the appeal myself on a remaking of the decision under Article 8 I would have dismissed the Appellant's appeal as the decision taken was proportionate.

Notice of Decision

The decision of First-tier Tribunal Judge Scott does not contain a material error of law and is maintained;

No anonymity direction was sought at the First-tier Tribunal, no such direction was sought before me. No such order was made.

Signed Dated 23rd November 2015

Deputy Judge of the Upper Tribunal McGinty