Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13590/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 January 2018	**On 14 March 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

OYETUTU SARAH OGUNLEYE
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Waithe
For the Respondent: Ms Ahmad

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born in 1980. She appeals against a decision of the respondent made on 3 December 2015 to refuse her further leave to remain following an application made on 2 December 2015.

Background

2. The immigration history is that she claimed to have first entered the UK as a visitor in 2002 and to have overstayed.

3. Subsequent applications for leave outwith the Immigration Rules made on 23 March and 18 August 2008 were respectively rejected on 11 April and 27 August 2008.
4. A grant for leave outside the Rules was made on 29 September 2008 and was granted until 25 September 2010. Two further periods of discretionary leave outside the Rules were granted, the most recent period extending until 29 November 2016.

5. The refusal letter noted that the appellant had initially been granted leave to remain in September 2008 on the ground that her child B O (known as V) who was born on 16 April 2006 suffered from severe disability. V died on 22 March 2014. The appellant's leave was curtailed on 7 February 2016.

6. The respondent did not find that the appellant had provided evidence which would meet the requirements of Appendix FM with respect to family life. Also, in respect of private life rights in terms of paragraph 276ADE(1)(vi).

7. She appealed.

First tier hearing

8. Following a hearing at Taylor House on 29 March 2017, Judge of the First-Tier Buckwell dismissed the appeal.

9. The judge's findings are at paragraph 27ff. Analysing the length and status of the appellant's stay in the UK, he found that she had no leave between 2002 and September 2008. Further, that having been granted discretionary leave on the basis that she was looking after V and because of his medical condition, the purpose for which such leave was granted ended on 22 March 2014 when V died.

10. Following the approach set out in ***Razgar*** [2004] UKHL27 the judge accepted that there was private and family life. It was noted that her son B, aged 17 years is in the UK on a student visa.

11. Having found that removal would interfere with the right to respect for private and family life the judge advanced to the consideration of proportionality.

12. In that regard, he found that as a result of V's death the appellant had not accrued a six year period of leave such as to be entitled to ILR. Turning to consider section 117B of the Nationality, Immigration and Asylum Act 2002 he gave little weight to any private life established between 2003 and 2008 when she was unlawfully in the UK. Also, to the period after 2008 when the immigration status was precarious, namely, the periods for which she was granted discretionary leave because she had no entitlement to expect any further extension of leave.

13. Turning next to section 55 he noted that the appellant's son is 17 years old and studying here. He is '*very nearly an adult*' and has student accommodation independent from his mother. The judge found that his best interests were to stay on his course of studies until he finished them and within his visa term.

14. The judge concluded by expressing sympathy for the '*very sad circumstances*' involved but, making particular reference to the original basis for granting discretionary leave no longer subsisting due to the death of V, found that the respondent's decision to remove the appellant was not disproportionate.

Error of law hearing

15. The appellant sought permission to appeal which was granted on 29 November 2017.

16. The crux of the grounds, repeated before me, was that the judge in looking at proportionality gave inadequate consideration to the appellant's history, in particular fleeing an abusive marriage in Nigeria, and her claim that she would have no home or family to return to as they disapproved of her having a child, V, by another man.

17. Further, inadequate weight had been given to the emotional impact of requiring her to leave, particularly as she visits V's grave often. Also, she is afraid of leaving her 17 year old son here.

18. In addition, inadequate consideration had been given to the appellant's private life in the UK including her work and involvement in the church.

19. The judge had not referred to statements from the appellant, her son and others in support, nor to paragraph 276ADE.

20. Ms Ahmad's position was that while the decision was succinct the judge had dealt with the material aspects adequately and reached a conclusion on proportionality which was open to him.

Consideration

21. In considering this matter I find difficulties with the decision. As the judge correctly noted this is an appeal on human rights grounds. As indicated the judge found that family life existed. Such was clearly correct. The appellant's surviving child is still a minor albeit approaching adulthood. He is also in the UK studying. The judge correctly considered that her removal would engage Article 8. In my view the judge's assessment under proportionality of the child's best interests, namely that he should stay on his course of studies and remain here for that purpose until these conclude within his visa term was one that was open to him. It was noted that he lives in student accommodation independent from his mother.

22. The problem, in my view, is the judge's consideration of the appellant's private life.

23. It appears that he accepted that she has a private life and that removal would be an interference with the right to respect for her private life and to have consequences of such gravity as potentially to engage Article 8. However, the decision in the proportionality assessment, in my view, lacks analysis. In essence, in the assessment it is restricted to findings that although granted discretionary leave from 2008 until 2016 when it was curtailed because V died in March 2014, such did not entitle her under the relevant Home Office guidance to indefinite leave to remain, that whilst '*highly sympathetic'* to the sad circumstances with V's death the original basis for granting leave no longer subsisted. The judge also noted that under section 117B of the Nationality, Immigration and Asylum Act 2002 little weight should be given to private life accrued whilst the appellant was in the UK unlawfully as she was between 2003 and 2008 and when her leave was precarious, as it was thereafter.

24. The problem is that the judge has failed to give any consideration to the bundle of eighty three pages lodged for the hearing. Such included statements by the appellant and her elder son. In her statement, inter alia she gave an account of why she left Nigeria in 2002 due to domestic abuse by her in-laws, how having become pregnant by another man and giving birth to V she was deserted by him, how having given birth to another man's child she would be ostracised by her in-laws and that she would have no family, and no home to return to and would be destitute.

25. In the statement from her son and from others there is evidence of the appellant's involvement in the community, in the church and that she has worked and paid income tax.

26. None of this material which goes to consideration of private life was considered by the judge. Nor did he give consideration to paragraph 276ADE.

27. In her statement the appellant emphasises her desire to be near V's grave which she states she attends every weekend and cleans and lays wreaths on it. If removed she fears his grave will suffer neglect. It is further indicated that due to V's death she has a phobia of leaving her older son here in the UK.

28. As the judge noted the appellant's status, initially unlawful has since 2008 been precarious because her leave was temporary.

29. In ***Kaur (children's best interests/public interest interface)*** [2017] UKUT14 it was held that the 'little weight' provisions in Part 5A of the 2002 Act do not contain an absolute, rigid measurement or concept; 'little weight' involves a spectrum which, within itself contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

30. In this case I consider that grief and bereavement, which of course have no time limits, are a part of the appellant's private life associated with the aspect of moral integrity. As the former President stated in ***Abbasi and another (visits-bereavement-Article 8)*** **[2015] UKUT 463** '...*matters relating to death, burial, mourning and associated rites have been held to fall within the ambit of Article 8'* (at [6]). Also, at [15] *'The visitation and maintenance of the graves of family members and the act of grieving with others, whether ritualistic or otherwise, is an intrinsic feature of civilised society throughout the world.'*

31. I conclude that in failing to give consideration to material evidence that was before him the judge erred in his assessment of proportionality such that the decision must be set aside.

32. I was asked by Mr Waithe were I minded to set aside the decision to remake it by allowing it. I do not consider that to be the appropriate course. Findings need to be made on the various strands of the appellant's human rights claim.

Notice of Decision

33. The decision of the First tier Tribunal is set aside. The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing before a judge other than Judge Buckwell. No findings stand.

34. No anonymity order made.

Signed Date

Upper Tribunal Judge Conway