Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19563/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House Via Business for Skype	**Decision & Reasons Promulgated**
On 15th April 2021	**On 07 May 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS ROSE SUNDAY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adefioye Akindele, instructed by The Legal Resource Partnership
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge K M Verghis dated 27th October 2020, dismissing her appeal against the refusal of the Secretary of State made on 31st October 2019 refusing her leave to remain on the basis of her private life in the UK. Her application was made on 27th August 2019 and considered under paragraph 276ADE(1) of the Immigration Rules. The appellant claimed to have lived in the UK for eighteen years and eight months to the date of her application. The Secretary of State did not accept that she had lived continuously

in the UK. The appellant had provided no evidence that she had entered the UK in December 2000 as claimed, and, there was no evidence in their system or records that confirmed that she had entered the UK in December 2000 although she had provided evidence that she had resided in the UK for the years 2003, 2004, 2005, 2006, 2007, 2008 and 2019. She provided no evidence she was resident in the UK for the years December 2000, 2001, 2002 and from 2009 to 2018.

2. In relation to exceptional circumstances the appellant maintained she no longer had any ties with her home country, which is Nigeria, but that she had developed relationships and established a private life in the UK and a close bond and relationship with her nieces and nephews. The Secretary of State pointed out that she had claimed she only had leave to enter as a visitor, had remained unlawfully as an overstayer and that she still had parents who lived in Nigeria. She was being supported financially by family and friends in the UK. It was also noted that with reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children) that she did not have parental responsibility for her nephews and nieces.

3. In her decision, in which the judge set out the elements of the refusal letter, she noted that the appellant's parents still lived in Nigeria and she noted at paragraph 9 that the appellant's case was now that she had been encouraged to come to the UK for prostitution but managed to extricate herself from this situation and had continually lived with her sister and helped to look after the sister's children. The judge noted she was an author and her books aimed to assist and guide younger women in their development. It was recorded that her evidence was that she had been enticed to come to the UK with a promise of a job and a life opportunity, and went to live with her sister in December 2000 and then had a falling out with her sister, and went to live and work in Manchester. She said that her passport was taken from her as soon as she arrived in the UK in order to exert control over her to engage her in prostitution. There was no police report but the Tribunal at paragraph 16 found

> '*This evidence to have been given spontaneously and the account plausible. The Tribunal observes that it is not uncommon for people who are subjected to this type of coercive behaviour to find it difficult to make disclosure. If the appellant has fabricated this evidence, it would have been very easy to make spurious complaints and gain capital from it earlier. However the situation in which the appellant found herself does not excuse her failure to regularise her status in the UK over a long period of time in addition to working illegally*'.

4. At paragraph 17 the judge found that it was clear that the appellant had been aware that she was working illegally and '*the appellant disclosed that she did not report the people who took her passport and that the passport did not contain the correct information*'. She did confirm that the photograph attached to the passport was hers and she had never used a false name whilst in the UK. The judge at paragraph 17 onwards found as follows

> '17. … *The Tribunal finds that the appellant entered the UK using false details and an invalid passport; this goes against the appellant and in particular, her assertion that she did not know she was working illegally"*
>
> 18. *The duration of the appellant's stay in the UK is disputed. It is the appellant's case that she entered the UK in December 2000. This is confirmed by the sponsor in her statement and oral evidence.*
>
> 19. *The Tribunal found that the sponsor gave evidence in a straightforward manner, answering all questions put. The sponsor has been in the UK for approximately 27 years and naturalised as a British Citizen some 20 years ago. The sponsor is very clear that the appellant arrived in the UK in December 2000 when her eldest daughter, the sponsor's niece, was approximately 6 years old. The appellant helped the sponsor with childcare for her niece. She had encouraged the appellant to make a report to the Police about the seizure of her passport but it was only later that the appellant disclosed the coercive behaviour she endured and that was why she had not made a complaint.'*

5. The judge also at paragraph 21 recorded

> *'The respondent concedes that the appellant has provided some documentary evidence to demonstrate her presence in the UK in 2003 to 2008 and 2019 but in submissions stated the appellant had stayed continuously in the UK to accumulate years to assist her eventual application. The appellant has provided ample evidence by way of evidence from a number of witnesses, both oral and written to evidence her continuous stay in the UK. The Tribunal finds taking into account the evidence of the appellant and sponsor and the evidence in the round, that the appellant entered the UK, albeit on an invalid passport, in December 2000'.*

At paragraph 24 the Tribunal judge noted that the appellant had parents in Nigeria with whom she was in contact, had provided no evidence other than her assertions as to why she could not return to Nigeria, and no evidence to suggest her condition of diabetes was other than well controlled or that her medical needs could not be met in Nigeria and recognised that it was for the appellant to demonstrate the required standard that there would be very significant obstacles to her integration.

6. When considering Article 8 outside the Rules the judge applied **R (Agyarko) [2017] UKSC 11** and cited in her conclusions the Supreme Court authority of **Rhuppiah and the Secretary of State for the Home Department [2018] UKSC 58** which provided a definitive guidance on the meaning of precarious for the purposes of Section 117B(5) and she proceeded to adopt a "balance sheet" analysis setting out the positives and negatives. At paragraph 36 the judge reasoned the positives which included her relationship with the sponsor and children, that she had been ordained as a church minister and written books. At paragraph 37 she reasoned

> '37. *The Tribunal finds the following are negatives:*
>
> *a) The appellant entered the UK with an invalid passport in December 2000. That fact weighs against her but even if she had entered on valid*

travel documents, she has overstayed for a significant period of time, making no attempt to regularise her stay until 2019. The length of her overstay without any attempt to regularise her position until 2019 is a weighty factor.

b) The appellant sought work in Manchester, knowing that her status in the UK was not resolved. The appellant has sought to minimise her illegal employment by stating that she was naïve; the Tribunal has found that she sought work in the full knowledge that she was not entitled to do so; this weighs against her.

c) The appellant has not provided any evidence to support her contention that return to her country of birth will be unduly harsh. She has family in Nigeria to welcome her home.'

Permission to Appeal

7. The grounds for application maintained that the judge had failed to consider the appellant's case in the light of relevant case law. At paragraph 37(a), the judge found that the appellant entered the UK with an invalid passport in December 2000 yet failed to attach any weight to the totality of the length of the appellant's continuous residence in the UK of just below twenty years, that was an error of law.

8. The judge also found the appellant had competence in English, was financially independent and had formed enduring relationships and friendships and was a "church minister and is an author of two books which have been published" which had substantially influenced young people for the better through her work in the church; thus the appellant's contributions to society were in themselves capable of swaying a proportionality assessment. In her assessment on the evidence the judge fell into error, in that she failed to consider the guidance in **Thakrar (Cart JR, Article 8, Value to Community) [2018] UKUT 336** citing the authority of **UE Nigeria and the Secretary of State for the Home Department [2010] EWCA Civ 975**, such that

> *'in an appropriate case the weight to be given to the importance of maintaining immigration control can be diminished by reason of the effect that the removal of the claimant from the United Kingdom would have upon the community'.*

9. The appellant's circumstances diminished the public interest and the legitimate aim of immigration control and did not tilt the balance of proportionality assessment in favour of immigration control.

10. Permission to appeal was granted by Judge Zucker, stating

> *"Having found the appellant had, by the time of the hearing in October 2020, been unlawfully present in the United Kingdom for a continuous period of nineteen years and ten months, it is arguable that the judge gave insufficient weight to his own finding. Whilst there is no principle of 'near miss' the guidance in the case of **Patel [2013] UKSC 72** is apposite".*

11. At the hearing before me Ms Cunha, accepted there had been no Rule 24 nor cross appeal but submitted that there was an error of law because the judge had not made a clear finding in relation to the continuous residence. I note there were submissions made on file in which the Secretary of State continued to rely on her decision letter but in effect challengd the judge's finding on continuous residence. The Secretary of State asserted that the evdience supporting continuous residence was vague, relied only on the sister's evidence and should be resisted. Mr Akindele strongly resisted Ms Cunha's submission that no clear finding had been made on continuous residence.

Analysis

12. In view of **Binaku (s.11 TCEA; s.117C NIAA; para. 399D)** [2021] UKUT 00034 (IAC), however, it is not open to the Secretary of State to appeal at this stage because she was successful in her resistance of the appeal. As explained in **Binaku** at paragraph 45:

> *'The outcomes-based approach is reflected in the conclusion of Underhill LJ in paragraph 27 of Devani that the right of appeal under section 11(2) of the 2007 Act lies only against an aspect of the "order" (or, as we have previously explained, the determination of the specific ground(s) relied on, including, where applicable, different articles of the ECHR) and that a party who has obtained "the exact outcome" sought cannot, as the "winning party", mount an appeal'.*

13. Notwithstanding, at paragraph 21 the judge clearly wrote

> *'The appellant has provided ample evidence by way of evidence from a number of witnesses, both oral and written to evidence her continuous stay in the UK. The Tribunal finds taking into account the evidence of the appellant and sponsor and the evidence in the round, that the appellant entered the UK, albeit on an invalid passport, in December 2000'.*

14. The judge carefully assessed the credibility of the appellant and gave sound reasons for the finding not least at paragraph 23 where the evidence of the appellant and her family was accepted. Mere disagreement about the weight to be accorded to the evidence, which is a matter for the judge, should not be characterised as an error of law, Herrera v SSHD [2018] EWCA Civ 412.

15. In my view the finding at paragraph 21 was an unambiguous finding that the judge acknowledged and appreciated the length of time the appellant had been in the UK but also that the appellant had evidenced that she had been in the UK for a continuous period since 2000. Indeed, from paragraph 14 onwards the judge considered the length residence in the UK. It is inconceivable that the judge was not aware of the years spent here when arriving at her final conclusion on proportionality. Indeed at 37 (d) the judge refers in her balance sheet to the 'long stay'.

16. The fact is that the judge went on when considering the matter on human rights grounds to specifically identify that Section 117B of the Nationality, Immigration and

Asylum Act 2002 holds that little weight should be given to a private life established at a time when a person is in the UK unlawfully which the judge did find at paragraph 32.

17. Mr Akindele emphasised that the appellant had by the time of the hearing been in the UK for 19 years and 10 months but the point was also made that she had been trafficked into the UK and this should influence the proportionality assessment. She had not reported that to the authorities because she was suspicious of them. It was accepted that further to paragraph 276ADE she had not been in the UK for the requisite 20 years as required under the Immigration Rules but it was not proportionate to remove her.

18. The judge recorded that when the appellant came to the UK in 2000, she thought she had had her entry facilitated by those who wanted her to engage in prostitution but she extricated herself from this situation, (rather quickly it would seem), as she went to live with her sister almost immediately in 2000. As the judge noted this did not prevent her from working. Only after a 'falling out' with her sister in 2002, did she move out and live and work in Manchester.

19. In terms of the circumstances of her entry, the judge set out the appellant's oral evidence of her account and recorded at paragraph 37(a) that, having lived with her sister, she made no attempts to regularise her stay until 2019. It appears she also helped her sister with childcare after coming to the UK [paragraph 19].

20. However, the issue of being trafficked was not part of the appellant's application to the Secretary of State nor appeal but even if it were not considered a 'new matter', it is clear that the judge was fully aware of both the length of the appellant's residence in the UK and her account of the circumstances of her entry. I am not persuaded that the judge failed to take the relevant circumstances of her arrival into account and critically this point was not even raised in the grounds of appeal to the First-tier Tribunal albeit the appellant was represented. There was no mention of the circumstances of her entry to the UK included in her witness statement nor the submissions by way of the skeleton argument on file. I am not persuaded the judge can be criticised for her approach to this evidence.

21. The judge legally directed herself properly on relevant caselaw. With regards the Immigration Rules she noted that the appellant had not been in the UK for 20 years but just over 19 years at the date of the hearing. By contrast with the grant of permission, Patel confirms at paragraph 56 and 57 the following:

> *'56. Although the context of the rules may be relevant to the consideration of proportionality, I agree with Burnton LJ that this cannot be equated with a formalised "near-miss" or "sliding scale" principle, as argued for by Mr Malik. That approach is unsupported by Strasbourg authority, or by a proper reading of Lord Bingham's words. Mrs Huang's case for favourable treatment outside the rules did not turn on how close she had come to compliance with rule 317, but on the application of the family values which underlie that rule and are at the heart*

> *also of article 8. Conversely, a near-miss under the rules cannot provide substance to a human rights case which is otherwise lacking in merit.*
>
> *57. It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in Pankina for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8'.*

22. Paragraph 276ADE (1)(iii) of the Immigration Rules (unlike **OA and Others (human rights; 'new matter'; s.120) Nigeria** [2019] UKUT 00065 (IAC) which deals with *lawful* residence) requires the appellant to have accumulated 20 years residence in the UK by the date of application. The application was made to the Secretary of State on 27th August 2019. If the appellant arrived in December 2000 the appellant had been in the UK at the date of application for 18 years and 8 months and not the 20 years stipulated under the Immigration Rules. Of that the judge was fully aware. In terms of length of residence this was a 'near miss' which fails to assist the appellant in terms of the Immigration Rules.

23. The judge also conducted an overall evaluative assessment of the appellant's life in the UK and found in relation to paragraph 276ADE (vi) that there were no very significant obstacles to her return to Nigeria. The judge stated at paragraph 24

> *'The appellant has been firm in her assertion that she cannot relocate to Nigeria as she has lost all contact with her home country. She does, however, accept that she has both parents in Nigeria and spoke to her mother about a month before the hearing. The Tribunal has not been assisted on this issue as the appellant has provided no evidence other than her assertions as to why she could not return to Nigeria. The appellant has diabetes; there is no evidence to suggest her condition is other than well-controlled or that her medical needs could not be met in Nigeria'.*

24. Having assessed the Secretary of State's position through the lens of the Immigration Rules, the judge turned to the essence of the appeal on human rights grounds. She correctly cited **R (Agyarko)** [2017] UKSC 11 which demands consideration of whether there would be unjustifiably harsh consequences on removal and a proportionate balance between the public and individual interest. The judge also applied Section 117A-B of the Nationality, Immigration and Asylum Act 2002 and created a 'balance sheet'. I have already identified the relevant factors and that she was fully aware of the appellant's claimed circumstances of entry and subsequent failure to regularise her stay. It was open to the judge to find that did not excuse the appellant's failure to regularise her status. Having found that the appellant's

attachments to her family did not amount to family life (and which was not challenged), the judge was entitled to consider that further to Section 117 B

> '*Little weight should be given to private life established at a time when a person is in the UK unlawfully or at a time when the person's immigration status is precarious*' [32].

25. Part of the challenge was that the judge had not factored into her assessment the contribution the appellant had made through her church work and writing of books. The judge, it was asserted, had erred by failing to address caselaw. The judge however did factor into her equation and on the "positive" side of the balance sheet at 36(b) that

> *'the appellant has been ordained as a church minister and is an author of two books which have been published. These achievement, however laudable, were completed in the full knowledge that her stay in the UK was not only precarious but unlawful'.*

26. Mr Justice Lane, President of the Immigration and Asylum Chamber considered in **Thakrar (CartJR; Art8: value to community)** [2018] UKUT 00336 the various authorities on the value of such contributions in decreasing the weight to be accorded to the public interest in an Article 8 proportionality assessment.

27. In **UE v SSHD** [2010] EWCA Civ 975 it was accepted that the weight to be attached to the public interest was not fixed or immutable and Sir David Keene at paragraph 36 emphasised there would be relatively few instances where the positive contribution would be very significant and thus reduce the public interest. In **UE** he opined

> *'36. I would, however, before concluding, emphasise that, while this factor of public value can be relevant in the way which I have described, I would expect it to make a difference to the outcome of immigration cases only in a relatively few instances where the positive contribution to this country is very significant, perhaps of the kind referred to by Lord Bridge in Bakhtaur Singh. The main element in the public interest will normally consist of the need to maintain a firm policy of immigration control, and little will go to undermine that. It will be unusual for the loss of benefit to the community to tip the scales in an applicant's favour, but of course all will depend upon the detailed facts which exist in the individual case and in particular on the extent of the interference with his private and/or family life'.*

28. Richards LJ in **UE** added at paragraph 40

> '*For those reasons I consider that contribution to the community is not a freestanding or stand-alone factor to be put into the Article 8 balance as an independent consideration in its own right. It can affect the balance only in so far as it is relevant to the legitimate aim or the private life claim'.*

29. In **Thakrar** at paragraph 112 Mr Justice Lane set out the criteria for considering the contribution to the community in an Article 8 assessment and concluded

> '*112. Accordingly, the warnings contained in the judgments of Sir David Keene and Richards LJ are important. Before coming to the conclusion that submissions regarding the positive contribution made to the United Kingdom by an individual fall to be taken into account, as diminishing the importance to be given to immigration controls, a judge must not only be satisfied that the contribution in question directly relates to those controls. He or she must also be satisfied that the contribution is "very significant". In practice, this is likely to arise only where the matter is one over which there can be no real disagreement.*
>
> *113. …*
>
> *114. Without in any way intending to be prescriptive, it is likely that one touchstone for distinguishing between instances that lie, respectively, exclusively in the policy realm and in the area of Article 8, is whether the removal of the person concerned will lead to an irreplaceable loss to the community of the United Kingdom or to a significant element of it'.*

30. It was clear that the First-tier Tribunal judge did not consider that the appellant's removal would be an 'irreplaceable loss'. At paragraph 22 the judge referred to the work of the appellant stating:

> '*The Tribunal accepts that the appellant has been an active member of her church, has been ordained as a minister and is an author but these achievements are set against the settled point that the appellant entered the UK in December 2000 with invalid documents, worked illegally and failed to regularise her stay until this application was made on 27th August 2019'.*

31. The judge considered the documentation and various character references within the bundle recording

> *'The Tribunal accepts the regard and affection in which the appellant is held by these witnesses and other witnesses whose statements are within the appellant bundle'.*

32. The Pastor Same Adetona from the Harvest Mission Outreach, stated that the appellant would be a '*valuable asset in the community*'. The Reverend Moses Simiyu of the River of Life Christian Fellowship in 2019 wrote of her

> *'upright conduct and transparent heart towards God and to people she contact with (sic)'.*

33. I do not wish to undermine her contribution, but nowhere did these ministers refer to the appellant's removal as being an '*irreplaceable loss to the community*'.

34. Similarly, Ms Ssemtoogo from Women with a Vision Movement commended her published work aimed at helping younger girls '*discover the beauty and talent within them so that they are empowered to break free of generational cycles of pain, depression and dependency*'. The appellant was described as a '*realist writer who relates well with her*

audience and a relevant voice'. The testimonies were laudable but did not refer to irreplaceability; those books had already been published and no doubt those books could be read with or without her presence in the UK and further works did not have to be written in the UK. Even if the judge did not expand on the contribution this was not a material error of law in view of the legal authorities and the evidence presented.

35. There was also a reference from Ms Danilewiez dated 2nd May 2019, confirming how the appellant assisted the sponsor when she arrived in the UK in 2000 with her child when the mother was working. Again this work is not for the community nor irreplaceable.

36. On a careful reading of the decision as a whole, it is not evident that the judge failed in her proportionality assessment to take into account the appellant's length of time in the UK nor her circumstances on entry or her contribution through her work. The judge factored in her contribution to the community, but in the face of the evidence presented and in view of **Thakrar** the judge's approach to the proportionality assessment did not contain any material error of law. Neither the circumstances of the appellant's entry nor her 'contributions' nullify the effect of Section 117 of the Nationality, Immigration and Asylum Act 2002 in this instance. The judge did make a clear and unambiguous findings that the appellant had remained continuously in the United Kingdom since December 2000.

37. I find no material error of law and the decision will stand.

Notice of Decision

The decision of First-tier Tribunal shall stand. The appeal of Ms Sunday remains dismissed.

No anonymity direction is made.

Signed *Helen Rimington* Date 26th April 2021

Upper Tribunal Judge Rimington