Neutral Citation Number: [2018] EWCA Civ 331

Case No: C5/2016/0595

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY UPPER TRIBUNAL JUDGE BLACK

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2018

Before :

LORD JUSTICE UNDERHILL
LORD JUSTICE HENDERSON
and
LADY JUSTICE ASPLIN

- -

Between:

STANLEY ONWUJE **ADEOBE ONWUJE**	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Sajid Mustafa (instructed by **One Source Solicitors**) for the **Appellant**
Mr Jack Parker (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 8 February 2018

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Judgment Approved

Lord Justice Underhill :

INTRODUCTION

1. The Appellants are husband and wife. They are Nigerian nationals. Since Mrs Onwuje's rights are dependent on those of her husband I will for convenience refer to him as if he were the only appellant. The Appellant came to this country in August 2008 with leave to enter as a student. His leave was subsequently extended to 30 September 2013, initially as a post-study migrant and then again as a student. His wife joined him in September 2010 as a dependant. They have since had three children, a daughter born in September 2011 and a twin boy and girl born in October 2013, who are also Nigerian nationals.

2. Prior to the expiry of his leave on 30 September 2013 the Appellant made an application for further leave. That was refused. The Appellant appealed, but the appeal was subsequently withdrawn.

3. On 6 March 2014 the Appellant made a further application for leave to remain as a tier 1 entrepreneur under the Points-Based System contained in Part 6A of the Immigration Rules ("the PBS Rules"). The business to which the application related was an employment agency in the health and care sector called Casgo Connections Ltd ("Casgo"), which he had recently established. On 25 March the application was refused by the Secretary of State because of defects in the "specified documents" which the Appellant was required to supply in order to show, in accordance with the relevant Rukes, that he had access to a minimum of £200,000 to invest in the business. I need not set out the details of the defects, through which we were not taken, but there were several: the most basic appears to be that the bank letter required under (I think) paragraph 41-SD (c) (i) of Appendix A did not state the amount of money available to the Appellant or indeed refer to him at all.

4. The Appellant appealed against that decision. At the hearing in the First-tier Tribunal his representative conceded that the Appellant was unable to satisfy the PBS Rules because of the problems with the specified documents. He also conceded that he did not fall within the terms of the rules covering applications on the basis of private or family life – that is to say, paragraph 276ADE and Appendix FM. However, he argued that the Appellant was entitled to leave to remain under article 8 of the European Convention of Human Rights "outside the Rules". By a decision promulgated on 10 December 2014 FTTJ James allowed the appeal on that basis. I will return to the details of his reasoning in due course, but in bare summary it was based on the fact that the Appellant's removal would mean that his interest in Casgo would be lost and that it would have to close its business.

5. The Secretary of State appealed against that decision. By a decision promulgated on 3 February 2015 DUTJ Black found that the decision of the FTT disclosed a material error of law. She re-made it and dismissed the original appeal against the decision of the Secretary of State.

6. This is an appeal against the UT's decision, with the permission of Christopher Clarke LJ given at an oral hearing. The Appellant has been represented by Mr Sajid Mustafa of counsel, who did not appear in either tribunal. The Secretary of State has been represented by Mr Jack Parker of counsel, who also did not appear below.

7. It is convenient to set out at this stage, because they crop up at several points in what follows, the terms of sections 117A-117B of the Nationality, Immigration and Asylum Act 2002 (introduced by section 19 of the Immigration Act 2004). They read (so far as material):

> "117A *Application of this Part*
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts —
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard —
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B *Article 8: public interest considerations applicable in all cases*
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English —
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United

> Kingdom are financially independent, because such persons —
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to —
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) …"

THE REASONING OF THE FTT

8. After some paragraphs containing introductory material and the procedural history, the Judge begins his discussion of the issues by observing, at para.16:

> "The focus of this appeal regards the difference between formalism and substance."

The obvious implication of that observation is that the Appellant had, as a matter of substance, the right to be granted leave to remain and that his application had failed only because of formal defects. It is convenient to say here that I do not believe that he was in a position to reach that conclusion. Since it was conceded that the Appellant could not succeed under the PBS Rules, neither we nor either tribunal have had to consider whether he was in fact in a position to satisfy the substantive requirements for leave to remain as a tier 1 entrepreneur and in particular whether he had £200,000 to invest; and it certainly cannot be assumed that he was.

9. At paras. 18-26 the Judge describes in considerable detail the evidence which was before him about Casgo. In short, it was established in 2013. It was based in Hove. It supplied temporary staff for care homes and the health sector in Kent and Sussex. It had three employees working for the business itself, one of whom was the Appellant's wife. It had about 75 other staff working for its clients: as I understand it, though this is not entirely clear, they were employed by Casgo. A rather confusing plethora of financial figures are referred to. The essential picture that emerges is that Casgo was doing good business and was profitable; also that the Appellant had invested £40,000 in it. At para. 26 of his decision the Judge says:

> "In times of austerity and economic depression it is clear this company under the ownership and directorship of the first Appellant, is providing an important service to NHS and local

> government delegated services and facilities, and much needed employment to the local community."

I have to say that the Judge's final observation must be read with a little caution. While I do not wish in any way to disparage the Appellant's achievement in setting up a successful business, the fact is that Casgo had only three employees working in the business itself; and even if the staff supplied to clients were also formally employed by it their work was with the institutions where they were placed and would have been available by whatever route the staff to do it was obtained.

10. There is also in para. 18 a very brief reference to evidence demonstrating that the Appellant and his family have a private life in this country, in the form of letters from the church that they attend and from the elder daughter's school.

11. Para. 27 of the decision reads as follows:

> "It is the routine argument of the Respondent that there is a need for an effective immigration system. The first Appellant and his partner have fully adhered to the conditions under their visas and have fully informed the Respondent of any material change to their circumstances, such as the birth of their three children, and have applied the appeal processes appropriately: confirming their motivation to comply with future requirements under the immigration system."

The bulk of this paragraph is unexceptionable, though the matters which it refers to are of limited weight in themselves in any proportionality assessment, since the issue was not the Appellant's past compliance but his inability to comply with the requirements of leave to remain for the future. However, the first sentence strikes an unfortunate note. The need for an effective immigration system is not a mere "routine argument". It is a matter of obvious importance, now reinforced by the provision of section 117B (1) of the 2002 Act.

12. Paras. 28 and 29 of the decision read as follows:

> "28. The children and the parents are Nigerian, and I found the evidence given of the first Appellant to be credible. He confirmed there was a family home in Nigeria and that he retained links and contacts with his extended family there on both sides of the relationship. It is not claimed there is any health problem in this family, or any obstacle to their return to their home country where their family, social, linguistic, religious and cultural ties remain. His sole request to remain in the UK is based on his family's wish to remain here and for him to continue his business.
>
> 29. There is no strong reason, other than the business and its positive economic consequences for the UK, given against removal. The church links made in the UK can be continued in Nigeria and the children are sufficiently young not to have

> formed any independent lives of their own, and return to Nigeria of this family unit would not breach Article 8 ECHR."

13. It might be thought that the conclusion in those two paragraphs meant that the appeal would have to be dismissed. But the Judge continues, at paras. 30-33:

> "30. However I find that the economic business of the first Appellant, which is of singular benefit to the UK and its citizens (both the employed 'bank agency' staff and the recipients/patients of the health and social care services), is not adequately catered for under the rules, which do not form a complete code on such matters, such that this is an exceptional case which needs to be assessed outside the rules under the ECHR.
>
> 31. The profitable and successful nature of the first Appellant's business (and its positive consequences for patients and staff, as well as the economy of the UK by way of income and tax paid), together with the full compliance of visa conditions and the credibility of both the Appellants, are most persuasive factors when placed against the formalistic nature of the refusal regarding designated documents, and the need for an effective immigration system.
>
> 32. To require the first Appellant to leave the country to apply from his home country under the relevant tier, would be otiose in the face of the documentary evidence now before me, and would only lead to a detrimental impact on the success of the business in his absence and the routine delay of making an application outside the country.
>
> 33. In regards to section 19 of the Immigration Act 2014 requires me to take into account the interests of the economic well being of the UK, and it is clear these Appellants speak English (which is one of the official languages of their country), are no burden on the taxpayers and are fully integrated into their community and our society. Their private life and relationship has been formed when both had extant visas to remain in the UK and were lawfully present. They have a genuine and subsisting parental relationship with their children and it would be unreasonable to remove such young children from their established home in the UK merely for the first Appellant to make his tier 1 application from overseas."

14. I understand those paragraphs to be the gist of the Judge's decision, but at paras. 34-37 he goes on to refer briefly to the burden of proof and (though in rather opaque terms) to *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, and the subsequent decision of the Upper Tribunal in *Omotunde v Secretary of State for the Home Department* [2011] UKUT 00247 (IAC). At para. 36 he says:

> "On the basis of the factual findings above, and taking the totality of the evidence before me into account, I find that Article 8, the right to respect for family life, is engaged in this case. Having considered the provisions of Article 8 I find that the refusal of leave to remain engages and interferes with private and family life, and although it has legitimate aims in regards to immigration control, I do not find that the Respondent's decision was reasonable and proportionate in all the circumstances of this particular case."

15. That reasoning runs together a number of points in a rather unstructured way. The best way I can analyse it is as follows:

(1) The starting-point is that the Judge clearly finds at para. 36 that the refusal of leave to remain and the consequent liability of the Appellant and his family to removal, would "engage and interfere with" their family and private life: in other words the first two "*Razgar* steps" are satisfied.

(2) As to the basis on which he makes that finding, it was canvassed before us that a possible reading of paras. 28-30, and particularly of para. 28, is that the Judge accepts that the rights of the Appellant and his family under article 8 (1) are not sufficiently engaged by the fact that they have lived in this country for several years and developed ordinary social ties – what I will call the conventional article 8 case – but finds that they are engaged by the Appellant's involvement in Casgo. However, reading the decision as a whole, I think that he intends to rely on both the conventional case and the Appellant's involvement in the business.

(3) When it comes to justifying that interference (i.e. the fourth and fifth *Razgar* steps) it is clear that the Judge accepts that the conventional article 8 factors could not by themselves outweigh the need to maintain an effective system of immigration control; and he bases his decision essentially on what he regards as the great value of Casgo "to the UK and its citizens": see paras. 30 and 31, and also the reference at para. 33 to "the economic well being of the country". He does also refer at para. 31 to the good immigration history and "credibility" (though it is unclear what that means in this context) of the Appellant and his family, and at para. 33 to the fact that they satisfy the requirements of section 117B (2) and (3); but it is clear that it is the business that weighs decisively in the scales. It is also clear that he reduces the weight to be given to the Appellant's non-qualification under the Rules because he regards them as "formalistic" (cf. para. 8 above).

(4) At paras. 32-33 he further discounts the weight to be given to the requirements of the immigration system by referring to the fact that if the Appellant were removed he could make a fresh application from Nigeria for entry clearance as a tier 1 entrepreneur. He takes it for granted that such an application would succeed and says that to require the Appellant to disrupt the lives of himself and his whole family in order to go through a futile process of that kind would be unreasonable. This appears to refer to the *Chikwamba* line of authorities (see [2008] UKHL 40, [2008] 1 WLR 1420), though the Judge does not explicitly refer to them.

THE REASONING OF THE UPPER TRIBUNAL

16. The Upper Tribunal found three errors of law in the decision of the FTT, which I can summarise as follows.

17. First, at para. 14 of her decision the Judge holds that the contradiction between the finding at para. 29 of the FTT's decision that the return of the Appellant and his family would not give rise to a breach of article 8 and the contrary findings at para. 36 itself amounted to an error of law.

18. Secondly, at para. 15 she holds that the FTT had erred "in concluding that Article 8 (1) was engaged through the Claimant's running of a business and its economic benefits to the UK". He also says that it had treated this as a "near miss" case and/or had taken the view that Article 8 gave "a general dispensing power for cases which do not meet the Rules", contrary to what is said in the judgment of Lord Carnwath in *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] AC 651: see paras. 56-57 (p. 674 G-H).

19. Thirdly, at para. 16 she finds that on the evidence the FTT had been obliged in any event to find that the refusal of leave to remain, and the Appellant's consequent liability to removal, was proportionate. She said:

> "I find that any interference would be proportionate to the legitimate end; namely the operation of a coherent and fair system of immigration control. The success or failure of a business venture is not a matter by which the respect for private life can be judged. It could be a factor in weighing public interest in the maintenance of immigration control and where the Tribunal would have regard to section 117 Nationality Immigration & Asylum Act 2012 (as amended). In that regard the Tribunal has erred in its failure to place weight on the strong public interest in the legitimate end."

20. Having found those errors of law, the Judge went on to re-make the decision. Para. 19 of her decision reads:

> "I now go on to remake the decision by dismissing the Claimant's appeal on immigration and on human rights grounds. The Claimant failed to meet the relevant Immigration rules under the PBS and in respect of family and private life. There is no justification to consider the matter outside of the Rules which fully cover the circumstances of setting up and running a business. The evidence relied on before the Tribunal fails to engage Article 8(1) private life. It is reasonable to expect that the Claimant could make a further application by producing the required specified documents to show that he had access to the funds, and he could make such an application from Nigeria. There is no interference with family life. The private life was established in precarious circumstances which carries weight having regard to section 117 2002 Act (as amended) and the Claimant had made no application under the

> rules when the business was set up. In assessing the public interest, which is seeking to achieve a fair and coherent immigration system, any interference is proportionate, notwithstanding the positive economic contribution made in setting up and running the business or the potential impact of its demise."

THE APPEAL

21. The grounds of appeal drafted by the Appellant's original counsel were replaced at the oral permission hearing by substitute grounds drafted by different counsel (not Mr Mustafa). These were rather diffuse, but the essential contention which Christopher Clarke LJ extracted from them, and on which he gave permission to appeal, was that the UT was wrong to hold that the fact that the Appellant had established a successful business, which would probably fold if he had to return to Nigeria, was irrelevant to his claim that his private life was engaged; and accordingly that it was not open to it to re-make the FTT's decision on proportionality. Although that issue was on its face concerned with private rather than family life, Christopher Clarke LJ acceded to a request from counsel to be permitted to refer to both aspects of article 8, so that the Court should be entitled to consider the issues as a whole.

22. I will take in turn the first and second *Razgar* questions – that is, whether the article 8 rights of the Appellant and his family would be sufficiently seriously interfered with by their removal (which would be the consequence of refusal to leave to remain) to engage article 8 – and the third to fifth questions – that is, in summary, whether any such interference was justified.

(1) Engagement of article 8

23. As will appear, I do not in the end consider that this is the decisive question in the case. I will nevertheless deal with it, but I can treat it more shortly than I otherwise would.

24. The issue of family life is straightforward. If the Appellant and his family were removed they would be removed together. There would accordingly be no interference with their family lives as regards one another, and there was no suggestion that they had other family in the UK. Mr Mustafa sensibly accepted this in his oral submissions.

25. As regards private life, the position has arguably been unnecessarily complicated by the emphasis placed by the FTT on the Appellant's involvement with his business. Mr Mustafa made it clear that the Appellant had always relied also on conventional private life grounds. In his witness statement in the FTT he gave evidence, albeit in fairly general terms, about the friendships and social life that he and his wife and children had developed in their local community and how fully integrated they were, particularly through church and school. It is fair to say that those general statements were not supported by very much in the way of independent evidence: the letters from the Appellant's church and his daughter's school are perfunctory. Nevertheless, the general proposition is entirely plausible. I would therefore be prepared to hold that the FTT was entitled to find that the right to respect for the private lives of the

Appellant and his wife and children was engaged by their liability to removal, even without any reference to his business.

26. Having said that, I have no difficulty with the proposition that in some circumstances an entrepreneur's ownership of, and involvement in, his or her business may also be regarded as an aspect of their private life for the purpose of article 8. In a well-known passage of its judgment in *Niemietz v Germany* (1993) 16 EHRR 97, the ECHR said, at para. 29:

> "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."

There are certainly cases where the work that a person does can properly be described as integral to their "physical and social identity" (to use the language of the ECHR in *Pretty v United Kingdom* (2002) 35 EHRR 1, at para. 61); and a case where an individual has established a business in which he or she remains actively involved may well come into this category. As regards this particular case, the Appellant's witness statement does not explicitly rely on the business as an aspect of his identity. Rather, it focuses on its importance to the local economy and to its clients, neither of which has anything to do with article 8; and that is likewise the focus of the FTT's reasoning. Since I would in any event find that article 8 was engaged on the more conventional basis discussed above, it is unnecessary to decide definitively whether on the basis of that evidence the Judge was entitled, to the extent that he did, to take the Appellant's involvement in Casgo into account when addressing the first two *Razgar* questions; but I am inclined to think that, despite its deficiencies, he was.

27. It follows that I do not agree with the first two grounds on which the UT held that the decision of the FTT was wrong in law. DUTJ Black makes some valid criticisms of the FTT's reasoning; but I do not believe that those criticisms undermine the essential finding that article 8 was engaged.

(2) Justification

28. As is generally the case, the real issue here is that raised by the fifth *Razgar* question, namely whether the removal of the Appellant and his family would be a proportionate means of achieving the legitimate aim of maintaining a fair and coherent system of immigration control.

29. I take first the conventional private life case. The starting-point must be that paragraph 276ADE of the Immigration Rules sets out the Secretary of State's judgment of the minimum length of lawful residence in the UK necessary to support an application for leave to remain on private life grounds. It is common ground that the Appellant cannot meet those requirements. Those rules represent the Secretary of State's judgment of the balance required by the public interest in the generality of cases, and it is now well established that it will only be exceptionally that there will exist compelling reasons such as to require leave to remain outside the Rules. The conventional private life case exhibits no such circumstances here, as the FTT in effect recognised at paras. 28-29 of its decision.

30. The case must therefore stand or fall on the weight to be given to the evidence about the effect of the Appellant's removal on the future of Casgo. His case before the FTT was that if he were removed Casgo would fold. It is not clear to what extent that case was challenged, but I am bound to say that I do not regard it as self-evident. If it is, as he says, a profitable business with good prospects for growth, it would presumably be saleable: the Appellant would lose the satisfaction of seeing it (hopefully) grow under his management, but he would receive a return on his investment. Another alternative would be to employ a manager who could run the business until he was able, as he says he would be, to satisfy the substantive requirements for leave to (re-)enter from Nigeria. However, these points are not explored in the FTT's decision, and I will proceed on the basis that the Appellant's removal would indeed mean that the business would close down. Even on that worst-case scenario I believe that his removal would plainly be proportionate and that the UT was right to overturn the FTT's decision to the contrary. My reasons are as follows.

31. First, the Secretary of State has established, under Part 6A of the Immigration Rules, an elaborate series of criteria under which non-British nationals may be entitled to leave to enter or remain by reason of their involvement in a business; those criteria include the ability to demonstrate that they can invest the specified level of funds. Absent compelling circumstances, it would be wrong to grant leave to remain to an applicant on the basis of his involvement in a business when he is unable to meet those criteria. The FTT appears to have thought that this was not a consideration of much weight because the Appellant's failure was only "formal". But, as I have pointed out at para. 8 above, there is no basis for that finding: there is no reliable evidence that the Appellant had £200,000 available for investment in accordance with the Rules.

32. Secondly, the Appellant built up his business at a time when, even if his presence was not positively unlawful, his immigration status was precarious (as to the meaning of that term, see *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803, [2016] 1 WLR 4203). The business was not even started before the expiry of his leave on 30 September 2013. From that point on he only had leave under section 3C of the Immigration Act 1971, which was contingent on the outcome, first, of an application and subsequent appeal which were eventually withdrawn, and then of the current appeal: it was on any possible meaning of the term precarious. (There was in fact a question raised in the oral submissions as to whether the Appellant even had 3C leave following the withdrawal of his first appeal, but we need not resolve that.) Section 117B (5) of the 2002 Act requires that little weight be given to a private life established at such a time.

33. Thirdly, I can see no compelling circumstances requiring the grant of leave outside the Rules. Mr Mustafa sought to uphold the FTT's reliance on the value of Casgo to the community. He pointed out that the economic well-being of the country is a consideration expressly referred to in article 8 (2), and he submitted that, as a thriving business, Casgo made a significant contribution to that well-being. He also emphasised the need to have regard to the interests of its employees and clients. But I cannot regard those as constituting sufficiently compelling circumstances. While I do not doubt that the closure of Casgo would cause some disruption and difficulty, it is hard to see that it would cause serious or lasting damage to individuals or to the wider community. I appreciate that the prospect of redundancy for the two office staff (i.e. excluding the Appellant's wife) would be unwelcome and probably upsetting; but there is no reason to suppose that they could not find other employment. As for the staff which Casgo places with NHS and other caring agencies, it is not Casgo which creates the work, and it plainly cannot be the only agency supplying such a service.

34. Fourthly, this case is not of the kind considered in *Chikwamba*. In the first place, it is not a requirement of the Immigration Rules that an application under Part 6A be made from abroad: if the Appellant chooses to make a fresh application for leave to enter from Nigeria, that will simply be because he has left, or been removed, in consequence of having no current leave to remain. Secondly and in any event, it has not been demonstrated that any such application was bound to succeed.

CONCLUSION

35. For those reasons I would dismiss this appeal. If the result is that the Appellant and his family have to return to Nigeria, and his investment, in terms of both money and effort, in Casgo is indeed wasted, that is sad. But it was his responsibility before he started to develop a business in the UK to ensure that he acquired the proper immigration status; and he did not do so.

Lord Justice Henderson:

36. I agree.

Lady Justice Asplin:

37. I also agree.