IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06136/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 December 2014	**On 12 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

MRS ROSELINE AMAKA OBIAJULUM UWAEME
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Vanas, Legal Representative
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. These are cross-appeals by the appellant, a Nigerian citizen, and the respondent against the determination of First-tier Tribunal Judge Thanki (promulgated on 19 September 2014) who dismissed the appellant's appeal under the Immigration Rules but allowed her appeal under Article 8 ECHR. The appellant entered the UK in 2008 with entry clearance as the dependent wife of her husband who at that time had limited leave to remain. Her husband, who is also a citizen of Nigeria, was granted indefinite leave to remain on 11 September 2013 on the basis of his lawful

residence in the UK for more than ten years. The genuineness and subsistence of the marriage is not in issue.

2. In his determination, the judge found that the appellant could not meet the provisions of paragraph 319E of the Immigration Rules because the appellant's husband was no longer a points-based system migrant (as he was when she entered the UK in 2008). Nor could she meet the human rights provisions of the Immigration Rules under paragraph 276ADE. He found, however, that the appellant must succeed under Article 8 outside the Rules for the reasons set out at paragraphs 21 – 29 of his determination. He found that it would be disproportionate in all the circumstances of her case for her to be required to leave the UK when her husband had been granted indefinite leave. The judge noted, at paragraph 27, that:

> "The appellant and her husband are both lawfully employed in the National Health Service and have an impeccable immigration history. The appellant and her husband pay national insurance and income tax and add to the economic well being of the country".

3. The grounds submitted by the Secretary of State refer to the cases of **Gulshan [2013] UKUT 00640** and **Nagre [2013] EWHC 720 (Admin)** and argued that there are no insurmountable obstacles to both the appellant and her husband relocating to Nigeria to continue their family life together. Nor were there any exceptional circumstances which warranted the First-tier Tribunal Judge considering the Article 8 claim outside the Rules.

4. At the commencement of the appeal hearing before me Mr Vanas, on behalf of the appellant, confirmed his instructions that if I were to uphold the decision of the judge under Article 8, his client would withdraw her cross-appeal which argued that she would, in any event, be entitled to remain as a spouse/partner under Appendix FM of the Immigration Rules.

5. In making his submissions, Mr Avery acknowledged that case law had moved on since the Secretary of State's grounds were submitted and he noted, in particular, the decision of Upper Tribunal Judge Gill in the case of **Oludoyi [2014] UKUT 00539** which had been handed down on 29 October 2014. He acknowledged that there is no longer any test or hurdle which the appellant must go through before an Article 8 claim, outside the Rules, is considered but that an appellant must still show special circumstances before an Article 8 claim can succeed on proportionality.

6. In reply, Mr Vanas argued that the judge had correctly applied the proportionality test. He noted that the appellant had obtained entry clearance and has been in the UK entirely lawfully for some six years as her husband's dependant. The House of Lords decision in **Chikwamba** applies: there is no purpose in her going back to Nigeria to claim entry clearance just because her husband's status in the UK has been upgraded

to ILR. Neither she nor her husband has any adverse immigration history. They are both working in the UK and contributing to the society here.

7. Having reviewed in its entirety the determination of the First-tier Tribunal I am satisfied that there was no error of law in relation to Article 8 outside the Rules such that the determination should be set aside. Although the judge gave only brief reasons in connection with proportionality I am entirely satisfied that there would be no purpose in a rehearing of the Article 8 claims because, having regard to the personal circumstances of both the appellant and her husband, the fact that he now has ILR and they have both been in the UK together for more than 6 years (the appellant's husband for more than 10 years) any fresh Article 8 claim is bound to succeed. Following **Chikwamba**, there can be no justification in the appellant being required to return to Nigeria to make a new application for entry clearance.

8. The determination of the First-tier Tribunal is accordingly upheld. I record that the appellant has withdrawn her cross-appeal.

Notice of Decision

There was no error of law in the determination of the First-tier Tribunal and that determination shall stand.

No anonymity direction has been requested and none is made.

Deputy Upper Tribunal Judge David Taylor
11 December 2014