Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08911/2013

THE IMMIGRATION ACTS

Heard at Field House Determination Promulgated

On 11th December 2013 On 15th January 2014

Before

UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE FRANCES

Between:

ABIOLA GAFAR YUSUFF

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Coward, Coward & Co Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 18th June 1988. He appeals against the determination of the First-tier Tribunal dated 27th July 2013 dismissing his appeal against the Respondent's decision of 8th March 2013 refusing him leave to remain as the spouse of a person settled in the UK under Appendix FM of the Immigration Rules and the decision to

remove him to Nigeria under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant was granted a visit visa valid from 24th October 2011 to 24th October 2013. He married the Sponsor, a British citizen, in September 2012. On 7th November 2012, he applied for leave to remain as her spouse. They are expecting their first child in December 2013.

First-tier Tribunal Judge's findings

3. First-tier Tribunal Judge Mathews found that the removal decision was not valid. It was conceded that the Appellant could not succeed under the Immigration Rules because the Appellant could not overcome the switching provision in E-LTRP 2.1. There were no tax records, accounts or P60's before the Judge and the payslips did not demonstrate the entire income claimed. The Judge found that there was insufficient evidence upon which to find the precise level of income.

4. The Judge found that the Appellant and Sponsor were in a genuine and subsisting relationship and were expecting a baby. The Sponsor was experiencing diabetes during her pregnancy, but was still able to work, as a nanny, full time. She was not significantly incapacitated beyond being pregnant. The Judge was not satisfied that the Sponsor could not be treated for diabetes in Nigeria.

5. The Judge found that, given the Appellant's education and family support, he could return to Nigeria without difficulty, as he had done in the past. The Sponsor had family and friends to whom she could turn for emotional support during any periods of separation from the Appellant. The Sponsor was close to her widowed father but he was not reliant or dependent on her.

6. The Appellant could not meet the Article 8 requirements of the Immigration Rules. The Appellant was fully aware of the limits of his status and the forthcoming expiry of his visit visa when he married the Appellant. The Judge properly directed himself following Razgar [2004] UKHL 27 and Chikwamba [2008] UKHL 40. He found that the Appellant had established family life in the UK and the refusal of leave would interfere with that right. The decision was in accordance with the law and necessary in a democratic society.

7. The Judge found that the Appellant had been a law abiding visitor and had a pregnant wife and friends in the UK. After he met the Sponsor, the Appellant had been travelling between the UK and Nigeria. He had family in Nigeria and was well educated. The Sponsor had been separated from the Appellant when he returned to Nigeria and had family and friends to who she could turn for support. She could join the Appellant in Nigeria if she wished and he could support her.

8. The Judge found that the Appellant had simply tried to avoid the prohibition on switching categories. He had been travelling to and from Nigeria throughout his relationship with his wife and he could do so while he applied for a spouse visa. It was important that he did so to ensure proper consideration of his claim and to ensure the protection of the economic position of the UK, by allowing his finances to be considered and to prevent undermining the restriction on switching categories.

9. The Judge found that the refusal of leave to remain as a spouse was not disproportionate in the circumstances and he dismissed the appeal under the Immigration Rules and on human rights grounds.

10. Permission was granted by First-tier Tribunal Judge Pooler on 8th November 2013 on the grounds that the Judge arguably erred in law in finding that the removal decision was not valid but subsequently dismissing the appeal.

The Hearing

11. The Appellant did not attend the hearing. Mr Coward submitted that it was accepted that the Appellant could not succeed under the Immigration Rules. It was also accepted that the appeal should have been allowed in so far as the section 47 decision to remove was unlawful and therefore this decision was not in accordance with the law. However, the Judge's consideration of Article 8, outside the Immigration Rules, was inadequate.

12. The Judge had failed to follow the approach in Chikwamba set out at paragraph 27 of the determination. The Appellant had a strong Article 8 claim; he was married to a British citizen and the disruption to his family life would be immense if he was required to leave the country for an unspecified period. The rights of the Sponsor had not been considered in the appropriate manner. The Judge did not deal with the obstacles of permanent relocation to Nigeria. He should have considered the effect on the Sponsor if she was deprived of the emotional support provided by the Appellant during her pregnancy. It was the height of bureaucracy to require the Appellant to leave the UK to make an application, which was likely to be successful at such a critical time.

13. Mr Walker submitted that the Judge had considered the effect of separation at paragraphs 22 and 31of the determination. The Sponsor had friends to whom she could turn for emotional support. It was important that the Appellant made an application through the proper channels and the financial aspects of his application were properly considered.

14. Mr Coward submitted that the Article 8 claim was a strong one and requiring the Appellant to leave the UK to make an application would be

disproportionate. The financial position need not affect the consideration of a powerful Article 8 claim. The family would be separated at a pivotal juncture. The Judge had failed to give enough consideration to this aspect of the claim.

Decision on error of law

15. Contrary to the submission made by Mr Coward, the Judge did consider the effect of separation upon the sponsor, a British citizen, from the Appellant. It is plain from the determination that the judge had regard to the present circumstances (she was pregnant and suffering from diabetes) but on the evidence found that she had been able to work full-time and planned to do so until November 2013 and that she was not significantly incapacitated beyond being pregnant (paragraph 21). Whilst this was a critical time for the Appellant and Sponsor, the Judge balanced this against the fact that the Sponsor had a wide circle of friends who had previously given her support during the periods when the Appellant had previously returned to Nigeria and that they, and the family members, were therefore available to provide emotional support during any further period of separation (paragraphs 22 and 31).

16. Further, the Judge placed in the balance the Appellant's immigration history and that he had been travelling to and from Nigeria throughout his relationship with his wife and had ample opportunity to make an application for leave to enter as a spouse. He had failed to do so and was now trying to circumvent the Immigration Rules (paragraph 33).

17. In addition, this was not a case where the Appellant satisfied all the requirements of the Rules save for a technicality. The financial position was unclear and given the Appellant's previous history, the Judge found that the public interest outweighed the Article 8 rights of the Appellant and Sponsor. In coming to this conclusion the Judge was well aware of the Sponsor's status as a British citizen and that she could not be required to leave the UK. He found that on the evidence before him the Sponsor could join the Appellant in Nigeria if she chose to do so (paragraph 32). He also took into account the fact that the Sponsor was pregnant, she suffered from diabetes and she would be deprived of her husband's emotional support if he returned to Nigeria to make an application.

18. We find that the Judge's findings were open to him on the evidence before him and he considered all relevant factors. There were cogent factors justifying the conclusion that Article 8 was not infringed by requiring the Appellant to return to Nigeria. We find that there was no error of law in the Judge's assessment of proportionality.

19. The Judge made no error on any point of law which might require the

determination to be set aside. The appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal dated 7th September 2012 shall stand save that the appeal against the decision to remove is allowed in so far as the removal decision was not in accordance with the law.

Deputy Upper Tribunal Judge Frances
10th January 2013