Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/41061/2013
IA/41039/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 June 2014	**On 11 June 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR HENRY OLUWASEUN OLUWANDE
MRS YETUNDE MOGBONJUBOLA LAWUYI

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr I Konusanac
For the Respondent: Ms A Holmes, HOPO

DETERMINATION AND REASONS

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Verity allowing the appeals of the appellants against the decision of the respondent made on 19 September 2013 to

refuse to vary their leave to enter or remain and to give directions for their removal from the UK.

2. The appellants are citizens of Nigeria born on 29 August 1978 and 6 June 1981 respectively. The second appellant is the wife of the first appellant. Although she was served with a full notice of decision with appeal rights, she is largely dependent on the outcome of her husband's case. The judge noted with regard to the second appellant that she holds a UK residence permit which was valid from 11 May 2011 to 23 August 2013. She therefore did not accept the respondent's conclusions in the Reasons for Refusal Letter that she was in the UK unlawfully.

3. In the respondent's decision it was stated that the first appellant had entered the UK in February 2007. The decision noted that the appellants had been granted limited leave to remain in the UK from 11 May 2011 until 23 August 2013. The decision also noted that the couple had children but concluded that the criteria had not been met and that there were no exceptional circumstances that required the Secretary of State to consider granting leave under Article 8 of the ECHR.

4. The judge held as follows:

> "23. ...
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> In this case, the first Appellant and second Appellant relied both on their private and family lives. They both rely on the fact that they have lived, studied and worked in the United Kingdom, have two children who are at school in the United Kingdom and have effectively put down roots in this country. However with regard to the first Appellant, it is abundantly clear, that he has an additional ground which could be incorporated into his private life. He has started legal proceedings against his former employer, the London Borough of Kingston, in the Employment Tribunal. These proceedings are for unfair dismissal and for direct and indirect racial discrimination. This Tribunal was given specific evidence of the nature of these proceedings and was also provided with evidence that the matter is due to be considered by the Employment Tribunal at a five day hearing in June 2014. This Tribunal has carefully concluded that if the first Appellant together with his wife and family were removed to Nigeria in accordance with the immigration decision, it would virtually be impossible for the first Appellant to conduct the legal proceedings or to be involved in them if he were to be removed to his home country. No evidence was provided by the Respondent of how the Appellant could overcome any of these difficulties, nor was there any evidence that video links could be established between the first Appellant's home country and the Employment Tribunal sitting at London South. It therefore follows that the first Appellant would find it almost impossible to

bring this claim against his former employer if he were to be removed to Nigeria. This would amount to a denial of justice for the first Appellant in his Employment Tribunal case and must therefore be regarded as an interference with his private life. This Tribunal would confirm that this interference would not be proportionate in all these circumstances. This Tribunal did consider granting an adjournment until after the conclusion of the Employment Tribunal matters. It decided however against this approach as it appeared that the first Appellant needed to resolve some issues as to his immigration status which were directly relevant to his future employment or otherwise. The Tribunal therefore decided against an adjournment and have concluded in accordance with **MH** that the appeal should be allowed pursuant to Article 8 of the ECHR and a grant of discretionary leave until the conclusion of the Employment Tribunal matters should follow.

24. Other aspects of Article 8 have been relied on by both appellants and these relate to the position of the second Appellant, the dependent children, the place where the Appellants live, where the children attend school etc. These matters have not been dealt with by this Tribunal as it would seem premature to make findings on these matters before the outcome of the Employment Tribunal is known. On a practical level, if the Appellant won his case before an Employment Tribunal he may be granted reinstatement by his former employer in which case presumably they would continue to live in the same area and the children would continue to attend the same school. If however there was no reinstatement it is perfectly possible that the first Appellant or indeed the second Appellant would seek employment elsewhere and that this in turn might necessitate the family moving and the children relocating to other schools. It is for these reasons that no findings are made with regard to the other substantive issues involved in Article 8.

Decision

25. The appeal is allowed pursuant to Article 8 (private life) of the ECHR and a grant of discretionary leave for an appropriate period is recommended by this Tribunal."

5. Permission was granted to the respondent on grounds which asserted that the judge committed errors of law because she erred in her assessment of the appellants' removability and proportionality of the decision, misapplying case law relevant to family proceedings and did not consider to what extent the appellants' employment in the UK was properly a factor in proportionality.

6. Ms Holmes relied on the grounds, in particular ground 3, which said that instead of considering the Employment Tribunal claim in isolation, the judge ought to have considered its relevance when compared to the other aspects of his family and private life in the UK. His employment aspect of his private life, was terminated by the dismissal which gave rise to the Employment Tribunal claim. That employment may or may not have been such as to engage: (a) Article 8, and (b) render a removal decision disproportionate.

   If the answers to these questions are affirmative in respect of the employment, they are affirmative in respect of the Employment Tribunal claim. If the answers to those questions are negative in respect of the employment, it follows that they must also be negative in respect of the ET claim.

7. The appellants' representative informed me that the first appellant's Employment Tribunal claim will be heard on 10 June. It will take five days and it is more likely that the decision will be given on the fifth day followed by written reasons.

8. Ms Holmes said she was baffled as to why the judge did not adjourn the hearing pending the outcome of the first appellant's Employment Tribunal claim. She said that the first appellant has Section 3C leave which would have covered him until the disposal of this appeal.

9. I note from paragraphs 5 and 6 of the determination that the appellants' legal representative had raised Article 6 for the first time at the hearing. This was on the basis that the first appellant had been dismissed from his employment by the London Borough of Kingston and that he had issued proceedings in the Employment Tribunal against his former employers. The first appellant needed to be in the UK in order to conduct his Employment Tribunal case. As the Home Office were seeking to remove him he would not be in a position to conduct his case or give evidence if he was removed to Nigeria. The Home Office Presenting Officer below asked for a short adjournment so that she could consider the arguments. Upon return to the hearing room, the judge confirmed with both parties that she had now studied all the correspondence relating to the Employment Tribunal and was concerned that Article 6 issues, together with Article 8 will be raised. It appeared that if the Home Office decision was upheld, the appellants would be removed from the UK together with their children and the first appellant would be prevented from appearing before the Employment Tribunal and giving evidence in June 2014. The judge indicated that apart from Article 6, this must also be a breach of Article 8 involving the first appellant's private life. The Presenting Officer indicated that she accepted that Article 6 was in issue and, as it dealt with civil litigation, this must include employment rights before an Employment Tribunal. She had stated that she was seeking an adjournment of the immigration hearing until after 1 July 2014 when the outcome of the Employment Tribunal proceedings would be known. The appellants'

representative opposed the adjournment request indicating that the respondent had been aware of the Employment Tribunal proceedings when the documents were served on 3 February 2014 and should have therefore considered this matter. He wanted the appellants' case dealt with immediately as this would clear the position with regard to the Employment Tribunal proceedings. He also said that the first appellant was currently in negotiating with his previous employer and was seeking reinstatement. His visa and its renewal was one of the reasons why the London Borough of Kingston, his previous employer, had dismissed him from his employment. If the first appellant did not have a visa he could not look for alternative employment. The Home Office should have asked for an adjournment on receipt of the main bundle but had failed to do so.

10. The HOPO below accepted that the first appellant had proceedings before the Employment Tribunal but said that this had come to the notice of the Home Office on 5 February when the 3 February bundle provided by the solicitors had been served. It was unrealistic to expect them to deal with this in a matter of days. She renewed her request for an adjournment. The appellants' representatives stated that a complaint had already been made against the Home Office with regard to this case and the way they had breached their own Regulations. He referred to a letter sent by him on 16 August 2013 to the respondent.

11. The judge then gave a short adjournment in order to consider the arguments regarding the adjournment request. Upon reconvening she made the following decision on the preliminary point at paragraph 18:

> "18. On this preliminary point I made the following decision:-
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> > 'I have considered all the legal arguments together with the documents submitted in this case which include details of the first Appellant's claim to the Employment Tribunal. I have noted that the first Appellant's claim before the Employment Tribunal is due to be heard in June 2014. I indicated to the parties that in view of these proceedings it would be disproportionate to remove the Appellants until the proceedings before the Employment Tribunal had been concluded and that it would amount to a breach of Article 8 (private life) of the first Appellant. I indicated also that I realised that other arguments had been made with regard to Article 8 which included both the second Appellant and the two dependent children and in particular family life, but that I considered it would be more appropriate for these matters to be considered after the conclusion of the proceedings in the Employment Tribunal when the situation regarding the first Appellant's employment or otherwise would be known. I considered therefore it would be premature to make findings with regard to other issues of Article 8 before the outcome of the Employment Tribunal was known. I

> indicated to the parties that I would allow the appeal and that the first Appellant, together with his family, should be granted limited leave to remain in the UK until the conclusion of the Employment Tribunal proceedings. Lastly, that I would provide full written reasons for this preliminary decision.'"

12. I find that the judge did not err in law in her decision not to adjourn the hearing. Her decision on the preliminary point was properly made following consideration of the arguments before her.

13. I also find that because the appellants' Article 8 claim is inextricably linked with the first appellant's Employment Tribunal claim, the judge was right to find that it would be premature to make findings on other aspects of Article 8 before the outcome of the Employment Tribunal is known. Furthermore, as found by the judge, if the first appellant won his Employment Tribunal he may be granted reinstatement by his former employer, which would in turn mean that the respondent would have to reconsider the decision to refuse the appellant leave to remain because his employment had been terminated by his employers. These findings are perfectly sustainable.

14. I therefore find that the judge did not err in law. The decision allowing the appellants' appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun