Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/47400/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 2nd October 2015

Decision Promulgated
On 8th October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mr AKEEM BABATUNDE SHITTU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Okafor, solicitor, of ADA solicitors
For the Respondent: Ms A Everett

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Phull, promulgated on 28 April 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 7 April 1968 and is a national of Nigeria.

4. The appellant entered the UK on 11 November 2004 with a visit visa valid until 6 February 2005. He has remained in the UK since then. On 23rd of April 2009 the appellant married a Czech national. That marriage ended in divorce. The appellant was encountered working illegally on 28 October 2010 and served with the removal decision. On 5 April 2011 the appellant applied for leave to remain in the UK arguing that removal would breach his article 8 ECHR rights. The respondent refused the application (without a right of appeal) on 10 May 2011.

5. On 1 December 2012 the appellant married a British national in a traditional marriage ceremony, by proxy, in Nigeria. On the 15th February 2013 the appellant applied for leave to remain as the spouse of a person present and settled in the UK. The respondent refused the application on 28 March 2013. The appellant asked the respondent to reconsider that decision, and on 3rd February 2014 the respondent adhered to the decision of 28 March 2013.

6. The appellant appealed that decision, and, before the case was determined by the First-tier Tribunal, the respondent withdrew the decision in order to reconsider the question of validity of the appellant's marriage. On 31st October 2014 the respondent refused the application of new, but accepted that the appellant was validly married to the sponsor and that there was a genuine and subsisting relationship between the sponsor and appellant.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Phull ("the Judge") dismissed the appeal against the Respondent's decision. The Judge found that the appellant did not fulfil the requirements of the immigration rules. The judge considered appendix FM and paragraph 276 ADE of the immigration rules before considering the appellant article 8 ECHR rights outwith the immigration rules.

8. Grounds of appeal were lodged and, on 17 July 2015, Judge A K Simpson gave permission to appeal stating inter alia

> "It is arguable that the judge has mistakenly proceeded on the basis that this is a valid marriage as the decision is entirely silent as to the validity of a proxy marriage. Moreover, even if the judge had found this to be an invalid marriage, at the date of hearing she ought to have considered whether the relationship met the requirements of a "durable relationship", given that the couple had then been together for more than two years. There was no consideration whatsoever of the financial requirements of appendix FM."

The Hearing

9. Ms Okafor, solicitor for the appellant, sought an adjournment. She told me that she had only been instructed on the previous evening, that the appellant and his spouse had been ill and that she had only seen the appellant and his

spouse the day before the hearing. She went on to say that if the request for an adjournment was refused she was in a position to proceed. Ms Everett, for the respondent, opposed the application to adjourn.

10. I refused the application to adjourn. I was surprised that Miss Okafor said that she had only been instructed the previous day, because the appellant has not changed solicitor. It was the appellant's solicitors who lodged the notice and grounds of appeal on 20 May 2015 - more than four months before the date of hearing. The documentary evidence before me indicates that the appellant had not instructed solicitors for the first time less than 24 hours before the hearing the appeal. The same solicitors have acted for the appellant since at least 14 November 2014, when the appellant appealed against the respondent's decision to the First-tier Tribunal. In refusing the motion to adjourn I take heed of Miss Okafor's repeated declarations that she was in a position to proceed today.

11. Ms Okafor took me to the grounds of appeal and argued that the judge's consideration of appendix FM is fatally flawed because no specific finding has been made that the appellant and sponsor the parties to a valid marriage. She was critical of [4] of the decision, suggesting that what is said there amounts to a display of prejudice against the appellant. The thrust of her submissions was that the judge had failed to carry out an inadequate balancing exercise because return to Nigeria is impossible for the appellant because he and his spouse would suffer "*insurmountable hardship*" if the appellant were removed. Ms Okafor argued that the judge had not considered the sponsors circumstances, and failed to take account of the fact that the sponsor has lived in the UK for 27 years.

12. Ms Everett for the respondent told me that there are no material errors of law contained within the decision, and that the three grounds of appeal are ill-conceived. She emphasised that no challenge is taken by the respondent to the validity of the marriage nor to the subsistence of the relationship between the appellant and sponsor, and drew my attention to the evidence which was placed before the judge before submitting that the findings in fact made are the only findings in fact that the judge could have made on the basis of the evidence placed before her.

Analysis

13. There is no merit in a challenge raised to [4]. It is clear from a fair reading of the determination that the judge simply records the procedural truth that the case was determined without the benefit of oral evidence. There is neither explicit no implicit criticism of the appellant for choosing to proceed on the basis of documentary evidence alone. All that is recorded is that that was the material available to the judge to make her findings of fact.

14. At [14] the judge records "*the respondent accepts that the appellant and his wife are in a genuine and subsisting relationship*". It is true that there is no specific finding of fact that the appellants' marriage is recognised in UK law, but that finding is not necessary. The respondent does not challenge the

validity of the marriage. The application is an application for leave to remain in the UK. The finding at [14] identifies the sponsor as the appellant's wife & recognises their relationship. There is sufficient contained at [14] to make it clear that the judge considered the appellant's article 8 ECHR rights both within and out-with the immigration rules on the basis that the appellant is married to a British citizen.

15. The second ground of appeal amounts to a challenge to the judge's approach to appendix FM. It is clear from an holistic reading of the judge's decision that the judge carefully considered appendix FM and paragraph 276ADE of the immigration rules, and found that the appellant could not fulfil either for the reasons given by the respondent in the reasons for refusal letter dated 31st October 2014. [12] [13] [14] & [15] of the decision make it clear that the judge made findings of fact drawn from the evidence placed before the judge.

16. Before me, the appellant's solicitor urged me to find that there was a failure to consider "*insurmountable hardship*" and insurmountable obstacles to return. I have considered the documentary evidence which is placed before the judge at first instance. No evidence of insurmountable obstacles (or hardship) was placed before the judge. The judge cannot make findings of fact on anything other than the evidential material placed before the judge. The judge cannot be faulted for not making a finding of fact on a matter which was not placed before her.

17. The final ground of appeal argues that the judge failed to take account of the length of time the sponsor has lived in the UK. The ground is misconceived. At [2] the sponsor is identified is a British citizen. Between [5] & [11] the judge rehearses the evidence placed before her. Between [17] & [22] the judge carries out a thorough and balanced assessment of article 8 ECHR proportionality.

18. A full and fair reading of the decision demonstrates that the decision is not tainted by material error of law, and that the findings of fact made by the judge are based on the totality of evidence placed before her. The conclusions reached by the judge were conclusions which were open to the judge to reach.

19. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge to have taken no account of evidence that was not before him.

20. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference

consistent with truthfulness because an Immigration judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration. In Mibanga v SSHD [2005] EWCA Civ 367 Buxton LJ said this in relation to challenging such findings:

> "Where, as in this case, complaint is made of the reasoning of an adjudicator in respect of a question of fact (that is to say credibility), particular care is necessary to ensure that the criticism is as to the fundamental approach of the adjudicator, and does not merely reflect a feeling on the part of the appellate tribunal that it might itself have taken a different view of the matter from that that appealed to the adjudicator."

21. At paragraph 49 of MA (Somalia) [2010] UKSC 49, it was said that "*Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned".*

22. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

23. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

24. I therefore found that no errors of law have been established and that the Judge's determination should stand.

DECISION

25. The appeal is dismissed.

Signed Date 7 October 2015

Deputy Upper Tribunal Judge Doyle