Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00101/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 May 2015	**On 7 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

RAPU EMEFIANEM PATRICK IWEGBU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: None

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Entry Clearance Officer. Nonetheless I shall refer to the parties as they were termed before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria born on 3 July 1973 and he appeals against a decision dated 21 November 2914 to refuse him entry clearance as the spouse of a person present and settled in the United Kingdom, that being Kila Bubb.

3. His application was refused on the basis that he had previously presented two visa applications on 8 May 2012 and 8 November 2012 giving his wife's names as Rosemary Okoh. There was an absence of a divorce certificate and his marriage to the sponsor was not valid as he was not considered free to marry. Further he was not exempt from the English language test and had not provided a relevant certificate.

4. The appellant explained he had lived in a traditional relationship with Rosemary Okoh but the bride price was never paid so the marriage was never formally legalised. He produced a customary court order dated 21 December 2012 to show a dissolution of the relationship. The appellant maintained that he had sent an original degree certificate but this had been lost. He sent in a police report reporting it lost in transit on 18 December 2014.

5. The appellant's sponsor stated they were expecting their first child on 16 March 2015 and she had always maintained that the house and mortgage, and, if her husband arrived he would seek work whilst she was on maternity leave. Letters and medical reports about the pregnancy were produced which confirmed she was experiencing some complications and under a neurologist for migraine seizures. She was unable to cope without the support of her husband owing to the complications of her health and pregnancy.

6. First-tier Tribunal Judge Somal dismissed the appeal on the basis of the Immigration Rules but allowed it on Article 8 grounds. An application for permission to appeal was made. This contended that the judge had made no reference either implicitly or explicitly to the public interest factors particularised within Section 117B. The judge did not consider whether family life could be enjoyed in Nigeria other than finding Article 8 should be engaged. The judge should have asked the question prior to finding Article 8 engaged. There was inadequate reasoning to establish whether it would be unreasonable to expect the family life to be maintained in Nigeria. There were no exceptional circumstances disclosed by the determination.

7. It was also contended that the judge applied the incorrect standard of proof where he stated at paragraph 12 that the appellant's exclusion was a real risk of a breach of Article 8 rights. This was contrary to **Naz (Subsisting marriage - standard of proof) Pakistan UKUT 40 (IAC)** which confirmed that the relevant standard of proof both for the Immigration Rules and Article 8 is that of the balance of probabilities.

8. Permission to appeal was granted by Judge Page of the First-tier Tribunal. He found that only paragraph 17 contained any case specific findings

under Article 8. The judge found it would be unreasonable to expect the appellant to move from the UK where she is present, settled and working.

9. At the hearing before me, Mr Tarlow relied on the written grounds of application for permission to appeal. The essence of the decision was found in paragraph 17. Essentially Section 117 of the Nationality Immigration and Asylum Act 2002 was not considered. The details should be considered by the Tribunal. The reasoning given was very sparse. The sponsor is employed and earns a salary and has property but there was nothing about the maintenance of immigration control.

10. The hearing was put back in order for Mr Tarlow to locate the entry clearance bundle.

11. Miss Bubb confirmed that she had made a fresh application the week before the hearing before the Upper Tribunal. She was currently on maternity leave and her husband in Nigeria was currently unemployed. She had met him last March in England when he was visiting his family and two brothers who lived in the UK.

Conclusions

12. Although the judge found at paragraph 11 of the decision that the appellant had failed to undertake the English language test and the appellant could not meet the Immigration Rules, there were inadequate findings in relation to Article 8. At paragraph 15 the judge stated that there was no challenge to the nature of the relationship and to the financial requirements but part of the essence of rejecting the appeal was that the marriage was not valid. Indeed, the Entry Clearance Officer stated that the appellant had made two previous visa applications, on 8 May 2012 and 8 November 2012, stating he was married and gave his wife's name as Igeo Rosemary Iwegbu. The appellant produced a customary court order dated 21st December 2012 showing a dissolution of the relationship. There appeared, however, to be no analysis of this by the Entry Clearance Officer and indeed there was a reference in the entry clearance decision to state that "You have not provided a divorce certificate or evidence that you were free to marry".

13. I find on the basis that the Article 8 findings were inadequate that there was indeed an error of law which may make a material difference to the outcome.

14. As stated in **Singh v SSHD [2015] EWCA Civ 74** where the Immigration Rules do not fully address the Article 8 claims so it is necessary to consider the claim outside the Immigration Rules. A failure by the decision maker to consider Article 8 outside the Rules will only render the decision unlawful if the claimant shows that there has been a substantive breach of his or her rights under Article 8. As at the date of decision which was 21 November 2014 there was no reference by the Entry Clearance Officer to the fact that the sponsor was pregnant.

15. Applying paragraph 64 of **Singh** I find that not all the relevant factors were taken into account when deciding Article 8 and the five stage **R (Razgar) v SSHD [2004] UKHL 27** test should be applied.

16. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides for respect for a person's private and family life, their home and correspondence. An appellant has to show that the subject matter of Article 8 subsists and that the decision of the respondent will interfere with it. If he does so, then it is for the respondent to show that the respondent's decision is in accordance with the law, that it is for one of the legitimate purposes set out in Article 8(2) (in this case for the economic wellbeing of the country, for the prevention of disorder or crime and for the protection of the rights and freedom of others) and that it is necessary in a democratic society, which means that it must be proportionate.

17. I apply the structured approach in the guidance given in **R (Razgar)** and have regard to the following questions:

> *"In a case where removal is resisted in reliance on Article 8, these questions are likely to be:*
>
> *Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
>
> *If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?*
>
> *If so, is such interference in accordance with the law?*
>
> *If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
>
> *If so, is such interference proportionate to the legitimate public ends sought to be achieved?"*

18. Bearing in mind the very short length of the relationship between the appellant and the sponsor, and the fact that he had made an application in May and November 2012 giving his wife's name as Rosemary Okoh I find this undermines the strength of the relationship between the appellant and the sponsor and albeit that the sponsor is intent on a relationship, as at the date of decision of the Entry Clearance Officer, the appellant has made concerted efforts to enter the UK prior to this application and only explained the breakdown of his former relationship when challenged. I appreciate that the appellant and sponsor maintain that they are married but I am led to doubt the strength of the relationship between the parties

and I am not persuaded that the appellant intends to live permanently with the sponsor.

19. That said, the threshold for engaging Article 8 is low, and it is the case that the sponsor and appellant did form a relationship such that the sponsor states she is now married and pregnant with the appellant's child. Some family life must exist.

20. The decision was made in accordance with the law not least that the appellant could not fulfil the immigration requirements in relation to the English language test certificate and weight should be given to the position of the Secretary of State and immigration control, not least for the legitimate aim of the protection of rights and freedoms of others. I conclude that there is a legitimate aim being pursued in denying admission to a spouse in the claimant's circumstances, who does not comply with the rules on admission.

21. As it was accepted that the Immigration Rules had not been complied with, in that the English language test had not been provided, this is relevant to whether the appellant would be able to integrate in the United Kingdom. The Immigration Rules are indeed by starting point as they reflect the position of the Secretary of State. At the date of the decision the appellant was an unemployed logistics expert although there was financial evidence before me to the effect that the sponsor could support the appellant.

22. This leads to the question of proportionality during which I must consider Section 117B.

> 117BArticle 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.

23. The appellant had not demonstrated as at the date of the Entry Clearance decision that he had fulfilled the English language requirements.

24. I note that the parties undertook a legal marriage in Maidstone in August 2014 but this does not confirm the subsistence and the intention of either party and in the face of the questions that have been made in relation to the relationship I find that a separation whilst the formal requirements of the Immigration Rules are complied are not disproportionate.

25. At the hearing before me Mrs Iwegbu told me that she felt it was unsafe to travel to Nigeria. She also told me that her husband had a house in Delta State where he also had two children, one of 13 years and one of 7 years old who lived in Nigeria. She had no evidence in relation to health care in Nigeria. I can appreciate that she has a valuable task in schools in the UK but that does not tip the scales in relation to proportionality in her favour or mean that she could not be expected to live in Nigeria where she could apply for employment as she is a qualified teacher. When they married there was no guarantee that the appellant could enter the UK on a permanent basis.

26. I take into account the medical evidence submitted to me by Dr McAlonan's report dated 11th February 2014 which indicates that she has light sensitive migraine but she manages this through medication and tinted glasses. I considered the report from 'healthcare dmc' which stated that she could suddenly lose consciousness. That said the appellant was being treated and appeared to continue to work and thus sponsor her husband coming to the UK.

27. Her health conditions are said to include her suffering from ADHD and migraines and migraine seizures but none of these conditions prevented her from teaching at the time of the report and there was no evidence put before me that she was on permanent sick leave (I note she was on maternity leave) or to the effect that there is no medical support in Nigeria.

28. **ZH (Tanzania) (FC) (Appellant) v SSHD [2011] UKSC 4** does not apply to the unborn child because as I state my decision relates to the date of the decision taken by the ECO and it was taken prior to the child's birth. However, I have considered whether the principle should be extended to all children who will be directly affected by this determination. I have had regard to the principles advanced in **T (s.55 BCIA 2009) – entry clearance) Jamaica [2011] UKUT 483 (IAC)** and, further in **Beoku-Betts (FC) (Appellant) v SSHD [2008] UKHL 39** and I conclude that the welfare of *all* children affected by the decisions should be given sufficient weight and the extent of that weight we have referred to below. The appellant would appear to have young children in Nigeria who live close to the appellant and it is logical to conclude that these children will have their relationship with their father diminished.

29. Article 8 does not oblige states to respect the choice by married couples of their matrimonial residence or to accept the settlement of a non-national spouse in the country. The relevant principles were articulated in **Abdulaziz, Cabales and Balkandali v UK [1985] 7 EHRR 471**. I conclude that it would be reasonable to expect the sponsor to continue conduct his family life as he has done hitherto. There are no obstacles to him continuing family life as he has done so hitherto.

30. Failing that I find that it would be reasonable for the appellant and sponsor to relocate in Nigeria. Both the appellant and sponsor knew when

they forged this relationship that there was no guarantee that they would be able to conduct their family life in any particular country and Mrs Iwegbu knew that her husband was a Nigerian national. Further, she must have known that he had children in Nigeria for whom he must have some responsibility. I emphasise that my decision is made in relation to the Entry Clearance Officer's decision in November 2014 and this was when the sponsor was pregnant but there was no child in existence at that time.

31. I have taken into account all the circumstances including those of the sponsor at a time when she was pregnant but at the time of the decision she was able to continue with her life in the United Kingdom with recourse to the NHS. The fact that she provided important work to the community does not to my mind outweigh the need for adherence to immigration control. There was reference to a strain on her mental health and she, at the time of the Entry Clearance decision, accessed the NHS for this in the United Kingdom. Alternatively it was open to her to relocate to be with her husband.

32. Although the sponsor thought it dangerous in the Delta State the appellant continues to maintain a house there and his children live in that area. There was no indication that they could not relocate to a safer area in Nigeria and as I state above the sponsor has teaching skills which she could put to use in Nigeria and which would allow the appellant and her to relocate together. Although her husband is unemployed in Nigeria she could look for work there to support the family. Although she has family in the United Kingdom her immediate family is now that of her husband. No evidence was presented to me to the effect that all of Nigeria is an unsafe area.

33. I accept that she cannot be required to remove from the European Union but this is an option if she does not wish to be separated from her husband. Alternatively they can continue with their relationship as it is at present.

34. I acknowledge in accordance with **EB (Kosovo) [2009] UKHL 41** that there is no bright-line in assessing Article 8 cases and it is rarely proportionate to uphold an order for removal where the effect *is that a spouse cannot reasonably be expected to follow the removed spouse to the country of removal*, *or is to sever a genuine and subsisting relationship between parent and child*. This however is not a removal case and the relationship between the appellant and sponsor can continue as before

35. The application for entry clearance was defective but I am not persuaded that there would be significant interference with the family life. **R (on the application of Chen) v Secretary of State for the Home Department) (Appendix FM – *Chikwamba* – temporary separation – proportionality)** IJR [2015] UKUT 00189 (IAC)

'There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40'.

36. This is not a case in which **Chikwamba** [2008] UKHL 40 applies as it is not just the formality of an entry clearance application to be made. The appellant has failed to comply with a substantive element of the rules. It is also the case that this is an entry clearance decision not a removal decision. The status quo is maintained. Although I acknowledge that the state must have a respect for the family life of the individuals, it is open to the appellants to make a further application to show that they can comply with the Immigration Rules and that in effect any separation will be temporary only. The test is to show that there would be significant interference with family life even by a temporary separation such that the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In this particular instance it was always open to the appellant to make proper enquiries of the immigration regulations such that he submitted all the appropriate documentation at the time of his application. This is of course still open to him and I understand at the hearing before me that this is the course the parties have chosen to take.

37. Further to **Huang v SSHD [2007] UKHL 11**, taking full account of all considerations, I did not consider that any family or private life of the claimant was prejudiced in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. The particular facts of this case and the evidence relied on, are such that the claimant has not established that the denial of entry clearance was an interference with his family life and even if it were, it is a proportionate and justified interference in pursuit of legitimate aims. There was no challenge in relation to the dismissal of the appeal under the Immigration Rules and I set aside the decision in relation to Article 8 and remake the decision and dismiss the appeal of Mr Iwegbu.

Notice of Decision

The First-tier Tribunal made an error of law and his decision is set aside with respect to findings under Article 8 (the matter was dismissed under the Immigration Rules). I remake the decision and dismiss the appeal.

Mr Iwegbu's appeal on Article 8 grounds is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.