Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51185/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 January 2016	**On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS COMFORT MODUPE OGUNYINKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A. Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr T Hodson, Counsel instructed by Immigration Legal Services

DECISION AND REASONS

1. The respondent (hereinafter "the claimant") is a citizen of Nigeria born on 2 January 1952. This appeal arises from the decision of the appellant (hereinafter "the Secretary of State") to refuse her application for leave to remain in the UK under the Immigration Rules and Article 8 of the ECHR.

Background

2. The claimant has spent a considerable amount of time in the UK. The findings of the First-tier Tribunal ("FtT") indicate that she was in the UK between 1988 and 1993

during which time her son was born. From 1993 until 2006 she spent most of her time in the UK, returning to Nigeria regularly to renew visit visas. On 13 February 2006 she entered the UK and has remained in the UK continuously ever since.

3. On 1 August 2006 she applied for indefinite leave to remain. Her application was refused and her subsequent appeal dismissed. Her right of appeal became exhausted on 13 December 2006.

4. She claims to have made a further application in 2007 which was not dealt with by the Secretary of State. In June 2012 she was served with an IS.151A as an overstayer.

5. In January 2011 the claimant met her partner, a British Citizen, with whom she started living in July 2014. In this decision I have referred to the man with whom the claimant is living as her "partner" even though, as explained below, the FtT found that he does not meet the definition of partner in the relevant Rules. The term partner in this decision, unless it is stated to the contrary, is used in its general sense and does not imply the above mentioned definition is satisfied.

6. On 13 August 2012 the claimant applied for leave to remain under Article 8. On 10 December 2014 the Secretary of State refused her application. It did not accept she was able to satisfy the Immigration Rules or that there were exceptional circumstances such that she should be granted leave to remain outside the Rules.

7. The claimant appealed and her appeal was heard by FtT Judge Cameron. In a decision promulgated on 31 July 2014, the FtT allowed the claimant's appeal under Article 8 ECHR.

Decision of the First-tier Tribunal

8. The FtT heard evidence from the claimant, her partner, and her partner's daughter, son and mother. It found the evidence to be credible and truthful.

9. The FtT's factual findings, which have not been challenged, include the following:

   i. The claimant met her partner in January 2011 and has been living with him since July 2014. Before living together they spent considerable time together. The reason they did not start living together sooner was that her partner's daughter and grandson lived with the partner and there would not be sufficient space. In addition, there was a concern about how the neighbours would react to the relationship. At paragraph 83 the FtT stated that it was "satisfied that [the claimant] is in a genuine and subsisting relationship with [her partner] and that there are genuine intentions to marry once [the claimant] is able to do so."

   ii. The claimant last entered the UK in 2006 as a visitor and has never had leave in any other capacity.

   iii. The claimant is financially dependent on her partner, receiving £100 a month from him in addition to him covering the cost of rent.

   iv. The claimant's partner receives an income of £1,900 a month from an insurance policy due to an accident at work and has done for many years. The income would cease should he leave the UK permanently.

v. The partner has a daughter who suffers from depression and the claimant's partner provides assistance to her.

vi. The claimant made an application in 2007 (after her leave to remain had expired) which she has followed up on but has not been dealt with by the Secretary of State. There was a further delay of over two years before the Secretary of State responded to the application that gave rise to the present appeal.

vii. The claimant's son was deported to Nigeria on 25 November 2014.

10. Having made the aforementioned factual findings, the FtT determined, firstly, that the claimant was unable to satisfy the Immigration Rules. It found that Appendix FM could not be satisfied because the claimant did not meet the definition of a partner under GEN 1.2, which specifies that partners must have been living together for at least two years. As the claimant and her partner only began living together in July 2014 they were unable to avail themselves of the partner route under Appendix FM.

11. The FtT then considered the appeal outside the Immigration Rules. It acknowledged that the claimant's immigration status has always been precarious and that she and her partner would have been aware of this when they formed their relationship but that, pursuant to paragraph 117B(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), although little weight should be given to the relationship that did not mean it should be given no weight.

12. It found that notwithstanding the precariousness of the claimant's status, the balancing exercise under Article 8 favoured the claimant because particular circumstances weighed in her favour. Foremost amongst these were the difficulties the claimant's partner would face if, in order to continue family life with the claimant, he had to relocate to Nigeria. The FtT's findings were that he would lose his regular income and be unable to continue supporting his daughter who suffers from depression. At paragraph [93] the FtT stated that it would be unduly harsh and unreasonable to expect him to relocate to Nigeria.

13. The FtT also took into account the delays by the Secretary of State which had firstly enabled the claimant to develop a private life and then to form and stabilise the relationship with her partner. It also stated that in making its decision it had taken into consideration the principles in *Chikwamba* [2008] UKHL 40, finding that, although in normal circumstances it would be in the public interest for someone who has remained in the UK without leave to not benefit from the breach, in the specific circumstances of this appeal it would not be proportionate to require the claimant to leave the UK simply to re-make an application.

Grounds of appeal and submissions

14. The Secretary of State's first ground of appeal is that the FtT erred by carrying out a "freestanding Article 8" assessment without explaining why the case fell for consideration outside the Immigration Rules given that the claimant's circumstances fell within the ambit of the Rules, and that the FtT failed to establish factors that would engaged, and a breach, of Article 8 outside the Rules.

15. The second ground is that the FtT treated the delay in considering the application as determinative rather than a relevant factor to consider as part of a holistic assessment. Further, there was an error in failing to explain why the claimant could not return to Nigeria to make a fresh application without her partner accompanying her.

16. The third ground of appeal is that the FtT's consideration of the public interest was only superficial and there has been failure to take into account the factors under Section 117B of the 2002 Act.

17. Before me, Ms Fijiwala argued that the FtT had failed to identify, in accordance with *SS (Congo)* [2015] EWCA Civ 387, compelling circumstances as to why an assessment outside the Rules was appropriate. She submitted that there were no such circumstances and the assessment outwith the Rules was essentially the same as that within the Rules. She submitted that the FtT had failed to engage with the public interest in the claimant's removal.

18. Ms Fijiawla also argued that the FtT erred by giving weight to the delay following the claimant's 2007 application. The claimant's relationship with her partner was only entered into in 2011 and therefore the delay in 2007 was immaterial to the development of that relationship which underpinned the Article 8 claim. With regard to the delay following the 2012 application, this was only for two years and it was an error of law for the FtT to treat this as determinative.

19. Ms Fijiwala also argued that the FtT erred by relying on the principles in *Chikwamba*. The FtT had failed to take into account that the claimant could travel herself to Nigeria to make an application for entry clearance in accordance with the Rules as a fiancé. There were no findings to show why she could not travel alone. Further, it was her contention that the FtT erred in assuming the claimant would be able to satisfy the Rules if she made an application from abroad when there was no evidence to support this.

20. Mr Hodson's submissions were that the FtT undertook the correct approach in first determining whether the claimant could succeed under the Rules and then, because she could not, proceeding to consider the appeal outside the Rules. He argued that it is clear from the decision why there are compelling reasons to allow the appeal outside the Rules.

21. Mr Hodson did not accept that the FtT had made the issue of delay determinative. He also argued that even temporary interference with family life, which would be the consequence of the claimant travelling alone to Nigeria to apply for leave to enter, was disproportionate. He also argued that the FtT had properly directed itself to the issue of public interest and had taken into account the claimant's precarious immigration status.

Consideration

22. The FtT gave only brief consideration to the Immigration Rules before turning to consider Article 8 generally.

23. Paragraph 276ADE of the Rules was dealt with in only one line. At paragraph [81] of the decision the FtT stated that it was not applicable as the claimant last entered the UK in 2006. It is plain, from the factual findings, that Paragraph 276ADE(1)(vi) could not be satisfied. It is also clear from the decision that the claimant did not advance any argument in respect of 276ADE(1)(vi) and that it was not at issue before the FtT. In these circumstances, although it would have been preferable had the FtT given an explanation as to why Paragraph 276ADE was not satisfied, there was no error of law in it not doing so.

24. The focus of the appeal before the FtT, quite properly, was the relationship between the claimant and her partner and the relevant part of the Rules was paragraph EX.1(b) of Appendix FM.

25. In order to satisfy EX.1(b) and be entitled to leave to remain in consequence thereof the claimant was required to show:

    i. that she has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and

    ii. that there are insurmountable obstacles to family life with that partner continuing outside the UK.

26. At paragraphs [79-80] the FtT made a finding that the claimant could not satisfy EX.1(b) because although she was in a "genuine and subsisting relationship with a British Citizen", that British Citizen was not her "partner" as defined in Appendix FM. Under GEN 1.2 she would have to have been living with him for at least two years to be his "partner" but she had only been living together with him since July 2014. At paragraph [82] the FtT stated that this position appeared to have been conceded by the claimant.

27. Having determined (and taken into account the apparent concession of the claimant) that Appendix FM could not be satisfied because the definition of partner was not met, the FtT did not proceed to consider whether the second part of EX.1(b) was satisfied; that is, whether there were insurmountable obstacles to family life between the claimant and her partner continuing outside the UK. Instead, the FtT proceeded to consider the claim outside the Rules.

28. There was no error in this approach. As is now well established in the case law – see for example the headnote to *R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre)* IJR [2014] UKUT 539 (IAC) – once the FtT decided the appeal could not be decided under the Rules (in this case, because the definition of "partner" was not satisfied) the proper course was to look at the evidence to see if there was anything which had not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. I am satisfied that the FtT followed this approach and therefore that it did not make an error of law in proceeding to consider the appeal outside the Rules.

29. Ms Fijiwala's argument before me, however, was not only that the appeal should not have been considered outside the Rules, but also that the freestanding Article 8

assessment by the FtT was flawed because it failed to show there were compelling circumstances.

30. I agree with Ms Fijiwala that the claimant would need to show compelling circumstances to support her claim for leave to remain outside the Rules. The claimant's relationship with her partner was formed at a time when her immigration status was precarious and as made clear in *Nagre* [2013] EWHC 720 (Admin) at [48]

> "... in the majority of precarious family life cases where removal is in question, where the Secretary of State's officials conclude that the family member who is applying for leave to remain cannot satisfy the test in Section EX.1(b) in the new rules, it is unlikely that there will be a good arguable case (let alone a case that is ultimately found to be established) that Article 8 would require that leave to remain should be granted outside the Rules."

31. The FtT did not make an explicit finding that there were "compelling circumstances" in favour of the claimant. Nor did it state in clear terms why this case falls into the small minority of precarious life cases where removal of the non national family member would be disproportionate. However, that, in substance, is what in fact the FtT found.

32. The FtT's factual findings, which were not disputed, include that (1) the claimant's partner provides vital support to his daughter who suffers from depression; (2) he has a disability that prevents him working and is in receipt of a significantly monthly income that would terminate if he moved permanently abroad; and (3) he assists his daughter financially which would not be able to continue if he lost his income in consequence of moving abroad. Having made these findings the Judge determined, at paragraph [93], that it would be unduly harsh and unreasonable to expect the claimant's partner to relocate permanently to Nigeria to maintain family life with the claimant.

33. Moreover, the FtT found the claimant and her partner to be in a genuine and subsisting relationship where they intended to marry and where they had spent considerable time together, as a couple, before cohabiting.

34. These factual findings, taken together and considered in the round, can properly be described as "compelling circumstances". The FtT did not use this phrase, or an analogous one, but that does not amount to an error of law. It was made clear in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558 at [47] that a judge does not need to use the words "exceptional" or "compelling" to describe the circumstances under consideration, and it will suffice if that can be said to be the substance of the tribunal's decision. For the reasons set out above, I am satisfied that the substance of the decision shows that the FtT found there to be circumstances which can properly be described as compelling or exceptional.

35. The grounds argue that the FtT improperly treated the delay as a determinative factor. I do not accept this is the case. The FtT identified a range of factors which it weighed in favour of the claimant, including in particular the unduly harsh consequences for her partner arising from his particular financial and family circumstances. Delay was only one element which was taken into account.

36. Nor do I accept the Secretary of State's argument that the FtT failed to address the public interest in the claimant's removal. It is apparent from the decision that the FtT took into account the factors set out in Section 117B of the 2002 Act including the claimant's precarious immigration status and financial circumstances but found them to be outweighed by factors weighing in favour of the claimant.

37. For the reasons I have explained, the FtT was entitled, based on the evidence before it, to find that, even though the claimant's family life was established in the knowledge that she had no right to be in the UK, there were compelling circumstances to support her claim for leave to remain, with those reasons arising primarily from the obstacles her partner would face in continuing family life with her outside the UK. In finding that removing the claimant from the UK would be a disproportionate interference with her rights under Article 8, the FtT made a decision that was open to it on the evidence. Accordingly, it did not make a material error of law.

Decision

a. The appeal is dismissed.

b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

c. No anonymity direction is made.

Signed

Deputy Upper Tribunal Judge Sheridan Dated: 8 February 2016