Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21840/2015

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 16 May 2017	**On 2 June 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SELEYE PRESENT EFEREBO

Respondent

Representation:

For the Appellant: Ms S Khatun of Taj Solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State, I will for convenience refer to the parties as they appeared before the First-tier Tribunal.

2. The appellant is a citizen of Nigeria who was born on 27 December 1989. He entered the United Kingdom on 16 February 2012 with leave as a Tier 4 (Student) valid until 30 October 2015. That leave was subsequently curtailed to expire on 5 April 2015.

On 21 January 2015, the appellant made an application for further leave based upon his private and family life in the UK. That application was refused on 20 March 2015.

3. On 1 April 2015, the appellant made a further application for leave based upon his private and family life. That application was also refused on 27 May 2015.

4. The appellant appealed to the First-tier Tribunal. He relied upon his private and family life and, in particular, his relationship with his wife, Bethan Albina Eferebo, a British citizen whom he had married on 13 December 2014 and with their son, Kribi who was born on 22 December 2015.

5. Judge Loughridge concluded that the appellant could not succeed under the Immigration Rules (HC 395 as amended). First, he found that para EX.1. of Appendix FM of the Rules did not apply because it was not unreasonable for the appellant's son to leave the UK and relocate to Nigeria with his parents. Secondly, the judge found that there were no insurmountable obstacles to the appellant's family life with his wife continuing in Nigeria. Thirdly, the judge found that there were not "very significant obstacles" to the appellant's reintegration in Nigeria so that para 276ADE(1)(vi) did not apply.

6. However, Judge Loughridge went on to find that the appellant's removal was a disproportionate interference with his family life and allowed the appeal under Art 8 outside the Rules.

7. The Secretary of State was granted permission to appeal against that decision by the First-tier Tribunal (DJ Manuell) on 15 December 2016.

8. Following a hearing on 10 March 2017, in a decision dated 14 March 2017, I allowed the Secretary of State's appeal on the basis that the judge had erred in law in allowing the appeal under Art 8 outside the rules and I set aside the decision. My reasons are set out in my decision dated 14 March 2017 and I do not repeat them here.

9. The appeal was adjourned for a resumed hearing in order for the Upper Tribunal to remake the decision under Art 8 outside the Rules.

The Resumed Hearing

10. The resumed hearing was listed before me on 16 May 2017. The appellant was represented by Ms Khatun and the Secretary of State by Mr Mills.

11. Ms Khatun indicated that she did not wish to call any witnesses. She relied upon her written submissions made to the First-tier Tribunal (at pages 1-11 of the appellant's bundle). No new evidence was relied upon before me.

The Submissions

12. Ms Khatun submitted that the factual position in relation to the appellant and sponsor was unchanged. She relied upon the genuine and subsisting relationship

between the appellant and his wife. She relied upon the close family relationship with his spouse's family. She submitted that the appellant's removal would be harsh and the family would be devastated. It would not be reasonable to expect his son to leave the UK. If the appellant and his family went to Nigeria, then his wife's family would not be able to see their grandchild so often because of the cost and difficulties of travel. Ms Khatun submitted that it would be harsh to require the appellant's family to relocate and adjust to living in Nigeria. She submitted that there were "compelling circumstances", namely the appellant had a young child, his subsisting relationship with his wife and her family and both his wife and son were British citizens.

13. Ms Khatun submitted that the appellant was not reliant upon public funds. Both he and his wife were supported financially by her family and were living in accommodation with her parents. She submitted that the appellant was likely to be able to work if he remained in the UK and not reliant on public funds. He is a person of good character. She submitted that the family's future lies in the UK.

14. As regards the appellant returning to Nigeria to obtain entry clearance, she submitted that the family was unlikely to be able to do so given the appellant's young child. In any event, Ms Khatun submitted that any such application was unlikely to be successful as the appellant's spouse would be unlikely to meet the £18,600 income requirement in Appendix FM. She would require a number of jobs in order to do this and was currently not employed. She would need to produce at least six months' pay slips and there would be an inevitable delay perhaps of one and a half and two years if there was a refusal and a subsequent appeal.

15. In those circumstances, Ms Khatun invited me to conclude that it would be disproportionate to remove the appellant.

16. Mr Mills relied upon the judge's findings in relation to the application of the Immigration Rules. He submitted that the judge had already found, and it had not been challenged by the appellant, that there were no insurmountable obstacles to family life continuing in Nigeria and that it was not unreasonable for the child to go to Nigeria with the family.

17. Mr Mills submitted that, following the Supreme Court's decision in R (Agyarko and another) v SSHD [2017] UKSC 11, the appellant had to establish that there were "compelling circumstances" that outweighed the public interest such that a grant of leave outside the rules was appropriate.

18. Mr Mills submitted that, applying s.117B of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"), the fact that the appellant spoke adequate English was at best a neutral factor and he was not financially independent at the date of hearing even if, as was suggested, he could become so in the future. Mr Mills accepted that following the Supreme Court's decision in R (MM) (Lebanon) and others v SSHD [2017] UKSC 10, in determining proportionality and a claim outside the Rules third party support was relevant. It could be taken into account in an entry

clearance application but to what extent, following MM, was yet to be determined in any revised guidance by the Secretary of State.

19. Mr Mills submitted that the appellant's family life had initially been established when his immigration status was "precarious" and such family life was entitled to lesser weight and only in "exceptional circumstances" would any interference be disproportionate. He relied upon the Upper Tribunal's decision in Rajendran (s.117B – family life) [2016] UKUT 138 (IAC). He submitted that there were no "compelling circumstances" to outweigh the public interest.

20. Further, he submitted that this was not a Chikwamba ([2008] UKHL 40) case. He submitted that this was not a case, unlike Chikwamba, where the only reason that the appellant could not succeed in his claim for leave to remain was a procedural one and otherwise he met the requirements of the Rules. Further, Mr Mills submitted that any separation of the appellant from his family was proportionate and, in any event, the judge had found that the whole family could go back to Nigeria to live. In either circumstance, Mr Mills submitted, it had not been established that they were unjustifiably harsh consequences.

21. Mr Mills invited me to dismiss the appellant's appeal under Art 8.

22. Ms Khatun made no submissions in reply.

Discussion

23. As I have already indicated, Ms Khatun did not seek to rely on any new evidence before me. She placed reliance upon the evidence that was before the First-tier Tribunal.

24. Judge Loughridge set out the principal facts in his determination at paras 11-20. Nothing in the submissions of either representative suggested that the facts set out by the judge were other than accepted. He set out the underlying facts as follows:

> "11. The Appellant and his wife are in a genuine relationship and the Appellant does his fair share of looking after his son. These matters are conceded by the Respondent.
>
> 12. The Appellant and his wife first met in April 2014, at college. After their marriage they spent a few weeks in the Appellant's student accommodation in Swansea but since 10 January 2015 they have lived with the wife's parents, and her siblings, at their home in Bridgend.
>
> 13. The Appellant chose to defer his studies for the academic year starting in September 2014, partly due to difficulties paying the tuition fees and partly because by then he had met his wife and he saw his future somewhat differently. This appears to be why his leave was curtailed to 5 April 2015.
>
> 14. The Appellant has been completely accepted by his wife's relatives as part of the family. It is a close-knit family including her parents, siblings, grandparents, uncles, aunts and cousins.

15. The Appellant has friends and social connections in the UK having now been here for over four years.

16. Unfortunately, the Appellant has not been able to secure employment. He has enquired about jobs with numerous potential employers. They have told him that jobs are available but cannot be offered to him because of his immigration status. They have said he should go back to see them again once he has permission to work. He is desperate to work because he wants to support his family. His wife's parents, and her grandparents, have helped out financially because he is unable to earn a living.

17. The Appellant's wife does not work. She intends to work when their son starts attending primary school. However, she does not have particularly high qualifications and in order to meet the financial requirement for a spouse visa, of £18,600, she would need to have more than one job. She receives income related state benefits, currently child tax credits.

18. The Appellant and his wife would like to live independently from her family, in their own home.

19. The Appellant's wife has picked up a few words of Nigerian from the Appellant and his friends. However, she has not enrolled on a formal language course.

20. The Appellant has family members back in Nigeria including his mother, eight younger siblings and various aunts/uncles. His aunts/uncles live in the same general area of Nigeria from which he is from, but they are not immediately local."

25. The appellant's claim based upon his private and family life before the judge failed under the Rules. The remainder of the judge's findings and reasoning are set out at paras 29-39 as follows:

"29. In **EA Nigeria** only the third Appellant was born in the UK, and was Nigerian because she was born to Nigerian parents. The other child in the case was also Nigerian and accordingly the family comprised four Nigerian citizens, three of whom had come to the UK on the basis of a student visa. That is a very different factual scenario to the circumstances in this case, in which two of the family members are British citizens neither of whom have ever left the UK.

30. On the other hand, Mr Hibbs [the Presenting Officer] makes a good point in my view when he says that the cultural heritage of the Appellant's son is just as much Nigerian as it is British. It would not be difficult for him to grow up in Nigeria. It is self-evident that this would involve less contact with his maternal relatives than if he grows up in the UK, but on the other hand he would probably have more contact with his paternal relatives.

31. I conclude that it will not make any significant difference to the son whether he grows up in UK or in Nigeria. His best interests are to remain with his parents, and the location of the family unit is largely immaterial.

32. Accordingly, it would not be unreasonable for the son to leave the UK and relocate in Nigeria with his parents, and consequently EX.1(a) is not met.

33. I have little evidence about what life would be like for the Appellant and his wife in Nigeria. During oral evidence the issues cited were matters such as the weather and language, neither of which in my view are insurmountable. As Mr Hibbs put

it, there may be certain challenges but these could be overcome and would not constitute very serious hardship. It may well be that life in the UK is generally more comfortable than in Nigeria. However, that is not the test.

34. I must also take into account the fact that the Appellant's wife is part of a close-knit and extensive family in the UK, as well as having friends here, and that relocating to Nigeria would undoubtedly be a difficult process for her. Furthermore, she says in her witness statement that there are ethnic and cultural differences and that she cannot move to Nigeria as she was born and raised in the UK and all her connections and ties are here.

35. However, it seems to me that the wife has always made an assumption that the Appellant will be able to remain in the UK permanently, and has never seriously considered the possibility of relocating to Nigeria in order to be together. She says in her witness statement that the Appellant has always been open and honest about his immigration background and that when they met and began a relationship she was aware that he was in the UK legitimately. Being in the UK legitimately is not the same thing as having a reasonable expectation of being able to remain here permanently. His immigration status has always been precarious, meaning that his ability to remain has always been dependent upon a further grant of leave. He came to the UK as a student and his intention, presumably, certainly until he met his wife and they began a relationship, was to return to Nigeria after completing his studies. His wife has been somewhat naïve, in my view, in thinking that his long term status here was secure. There should have been some thought/discussion at the outset as to whether she was willing to go to Nigeria with him, if necessary, and that possibility should have been factored into the decision to proceed with their relationship and to have a child.

36. Overall, I find that the Appellant's wife would cope with life in Nigeria if this is the only way in which she, the Appellant and their son can remain together. The disruption to her life in the UK, even combined with the difficulties she may face in the short-term in adjusting to life in Nigeria, and any ongoing lack of 'creature comforts' which she would otherwise have in this country, cannot properly be categorised, in my view, as very serious hardship.

37. Accordingly, there are no insurmountable obstacles to family life between the Appellant and his wife continuing outside the UK, and consequently EX.1(b) is not met. I acknowledge that the Appellant and his wife have a very strong preference to remain in the UK rather than relocating to Nigeria, but a preference is not enough to fulfil the requirements of the Rules.

38. As for the Appellant's private life under the route of Paragraph 276ADE, I am not persuaded that there would be very significant obstacles to integration in Nigeria. I do not have very much information about his private life but it is reasonable to assume that he has made friends in the UK during the time he has been here, and he has also established social contacts within his wife's family. However, he lived in Nigeria until he was 22 years old, he is familiar with the culture of the country, he knows the language and he is in good health and capable of finding work there. Whilst there might be certain challenges in returning to Nigeria, they do not amount to very significant obstacles. I should make it clear that the issue of his wife and son do not fall to be considered under this provision because they constitute his family life and not his private life.

39. Accordingly, there are no 'very significant obstacles' to the Appellant returning to, and integrating in, Nigeria, and consequently Paragraph 276ADE is not met."

26. The judge made essentially four factual findings at paras 28-39 of his determination. First, he concluded that it was in the best interests of the appellant's son (aged 9 months at the date of the hearing before the judge and now aged 1 year and 5 months) to remain with his parents even if they were to relocate as a family unit to Nigeria. Secondly, it would not be unreasonable for him to relocate to Nigeria with his parents. Thirdly, there were no insurmountable obstacles to the appellant and his spouse continuing their family life in Nigeria. Fourthly, it was not established that there were "very significant obstacles" to the appellant returning to, and integrating in, Nigeria.

27. The appellant did not seek to challenge those findings either by seeking permission to appeal or in a rule 24 notice at either hearing before me. In my judgment, therefore, those findings stand unchallenged. Nothing in the evidence before me leads me to doubt the sustainability of those findings. Although the appellant's son is now 8 months older than at the time of the First-tier Tribunal's decision, no new evidence was led as to the impact upon him of relocating to Nigeria with his parents. Although Ms Khatun submitted that it would be unreasonable for him to leave the UK, at no time has the judge's finding to the contrary been challenged and, although the judge did not approach the issue of "reasonableness" by taking account of the public interest as required by R (MA) (Pakistan) and others v UTIAC and SSHD [2016] EWCA Civ 706, had he done so that could not materially have advanced the appellant's claim that it was "not reasonable" to expect him to leave the UK. Further, no new evidence was relied upon as to the impact upon the appellant's spouse and her family if she were required to relocate to Nigeria with her husband.

28. Therefore, I accept and apply Judge Loughridge's findings set out above.

29. The appellant's claim is put forward under Art 8 outside the Rules.

30. As regards Art 8, I apply the 5-stage test in R (Razgar) v SSHD [2004] UKHL 27 at [20]. I accept that Art 8.1 is engaged. I accept that the appellant has family life with his wife and son and, as the judge found, the "close-knit" family of his wife. In any event, the latter would, in my view, amount to private life in the UK. Ms Khatun did not place any reliance specifically on the appellant's private life in the UK and, at para 38 of his determination, Judge Loughridge noted that he had not been provided with "very much information about [the appellant's] private life". Nevertheless, I accept that, since his arrival in the UK in February 2012, the appellant will have established a private life in addition to social contacts with his wife's family. I accept that there is likely to be an interference with the appellant's private and family life if removed to Nigeria.

31. As regards Art 8.2, the Secretary of State's decision is clearly in accordance with the law, namely the Immigration Rules and the appellant's removal is in pursuance of a legitimate aim, namely effective immigration control.

32. The crucial issue is that of proportionality. That issue requires a fair balance to be struck between the public interest and the rights and interests of the appellant and

others protected by Art 8.1 (see Razgar at [20]). In MM, the Supreme Court reminded us at [43] that the "central issue" was:

> "Whether a fair balance has been struck between the personal interests of all members of the family in maintaining their family life … and the public interest in controlling immigration".

33. In carrying out that balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the considerations set out in s.117B of the NIA Act 2002.

34. The public interest, including that reflected in the fact that the appellant cannot meet the requirements of the Rules, is entitled to "considerable weight" (see MM at [75]; and also Hesham Ali v SSHD [2016] UKSC 6 at [46] *et seq* and R (Agyarko and another) v SSHD at [46]-[48]). The search is for "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see Agyarko at [48]).

35. In MM, the Supreme Court at [41] considered the position of a married couple and a claim to reside in the UK based upon Art 8 as follows:

> "There is no general obligation to respect a married couple's choice of country in which to reside or to authorise family reunification. It will depend upon the particular circumstances of the persons concerned and the general interest. Factors to be taken into account are the extent to which family life would effectively be ruptured; the extent of the ties in the host country; whether there are 'insurmountable obstacles' (or, as it has sometimes been put in other cases, 'major impediments': see, for example, *Tuquabo-Tekle v The Netherlands* [2006] 1 FLR 798, para 48; *IAA v United Kingdom* (2016) 62 EHRR 233, paras 40 and 48) in the way of the family living in the alien's home country; and whether there are factors of immigration control (such a history of breaches of immigration law) or publc order weighing in favour of exclusion (para 107). If family life was created at a time when the people involved knew that the immigration status of one of them was such that persistence of family life in the host state would from the outset be precarious, 'it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8' (para 108; note that this was expressed as a prediction rather than a requirement) …."

36. The judge's findings, with which I agree, were that it was in the best interests of the appellant's son to remain with his parents. It would not be unreasonable for him to relocate with them to Nigeria. The judge found that the appellant's wife could cope with re-locating to Nigeria even though she is a British citizen who has never been to Nigeria. Although there might be difficulties faced in the short-term by the appellant and his wife of adjusting to life in Nigeria, they would not suffer any "very serious hardship" and there were no "insurmountable obstacles" to them relocating to Nigeria.

37. There would, I accept, be a dislocation between the appellant's wife and her family in the UK which is close-knit. Whilst it was submitted that there would be difficulties, both practical and financial, in her family travelling to Nigeria to see both the appellant's wife and grandchild, Ms Khatun did not draw my attention to any evidence to suggest that such visits would be out of the question or that financial

support would not be available from the family of the appellant's wife in the UK in order to allow travel back to the UK for visits. And, of course, between visits modern internet communication via such applications as Skype would permit continuing contact in a way that is now commonplace between families split between countries or, indeed, geographically within a country.

38. As regards to the public interest, the public interest in effective immigration control, as set out in s.117B(1) of the NIA Act 2002, is engaged. Whilst I accept that the appellant is able to speak English, s.117B(2) of the NIA Act 2002 does not mean that the public interest is in some way lessened: it is, at best, a neutral factor (see Rhuppiah v SSHD [2016] EWCA Civ 803 at [59]-[61]).

39. Further, the public interest in s.117B(3) is engaged as the appellant is not "financially independent" as he is dependent upon third party support from his wife's family (see Rhuppiah at [63]). Consistently with what was said in MM at [41] and s.117B(4) and (5), the appellant's "family" and "private" life must be given "little weight" in that it was established at a time when the appellant (and his wife) were well aware that his immigration status was precarious, in the sense of temporary and that there could be no expectation of remaining in the UK in order to continue that family and private life.

40. Finally, s.117B(6) does not apply as, consistently with Judge Loughridge's finding which has not been challenged, although the appellant has a "genuine and subsisting parental relationship" with his son who is a "qualifying child", it has not been established that it would "not be reasonable to expect the child to leave the United Kingdom".

41. Ms Khatun submitted that the "compelling circumstances" to outweigh the public interest were the subsisting relationship between the appellant and his wife and her extended family, the position of his son and that both his wife and son were British citizens. I bear in mind that the private and family life of the appellant was formed at a time when his status was, at best, precarious in the UK and that this was known to both him and his wife: that is relevant in the assessment and the weight to be attached to any family life formed in such circumstances (see Jeunesse v the Netherlands (2015) 60 EHRR 17 and R(Agyarko and another) at [49]-[50]). I also bear in mind that both the sponsor and their son are British citizens.

42. In my judgment, the appellant has failed to establish "compelling" circumstances sufficient to outweigh the public interest that I have identified. Whilst there will be "difficulties" in the family relocating to Nigeria, it is in the child's "best interests" to remain with his parents and no specific evidence of detriment to him has been identified before me: the circumstances do not, in my view, give rise to "unjustifiably harsh consequences".

43. For these reasons, the refusal of leave to the appellant and his removal to Nigeria would not breach Art 8.

44. As regards the Chikwamba point, I accept Mr Mills' submission that this case is to be distinguished from that in Chikwamba. The essence of the Chikwamba point was identified by Lord Reed in Agyarko at [41]:

> "If … an applicant – even if residing in the UK unlawfully – was otherwise certain to be granted leave to enter, at least if an application was made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

45. Here, it is simply not established that the appellant would succeed in his entry clearance application and that, in effect, he is subject to removal simply in order to satisfy the procedural requirement of seeking entry from outside the UK. Indeed, Ms Khatun's submissions accepted that an application for entry clearance would have difficulties. There was no current evidence that would support the appellant meeting the £18,600 income based upon his wife's earnings. She is unemployed. Whilst I accept following MM, the Supreme Court has indicated that in applying Art 8 consideration must be given to third-party support, Ms Khatun did not specifically address the amount of third-party support available and whether it would satisfy, or come close to satisfying, the equivalent of an income of £18,600. Whether the appellant would, therefore, meet the entry clearance requirements as a spouse – even with a diluted financial requirement following MM – is speculative. I do not accept Ms Khatun's submission that the appellant's claim under Art 8 is strengthened by the fact that he is unlikely to be able to meet the requirements of the Rules for entry clearance or on a broader MM basis. As Mr Mills submitted, and I accept, the strength of an Art 8 claim, as is clear from Chikwamba and in Agyarko at [51], is premised upon hypothetical success rather than failure under the Rules and, therefore, a possible inference that the public interest does not require interference with private and family life simply to 'go through the motions' of leaving the UK and seeking entry clearance.

46. Further, as Mr Mills submitted, the judge's findings, which are not challenged, are that the appellant and his family can appropriately relocate to Nigeria. In the light of that finding, it is difficult to see why it would be unreasonable or disproportionate for them to go with the appellant to Nigeria in order to seek entry clearance even if, as Ms Khatun submitted, there might be a substantial delay in resolving the appellant's application for entry clearance. Mr Mills did not accept that the delay would be one and a half to two years but, given the need to amend the guidance to reflect the third-party support point in MM, he was unable to provide an estimate as to how long it would take to resolve such an application.

47. As I have already indicated, this is not, in my judgment, a Chikwamba case. In any event, I am not satisfied that it would be disproportionate to require the appellant to return to Nigeria to seek entry clearance whether or not he were accompanied by his family. Whether they choose to accompany him would be a matter of choice for them. It would not be unreasonable for them to do so and, given the public interest, if they choose to remain in the UK a period of separation in order to determine his application would not, in my judgment, be a disproportionate interference with his family and private life in the UK.

48. For all these reasons, the appellant has failed to establish that the Secretary of State's decision breaches Art 8 of the ECHR.

Decision

49. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. That decision was set aside by my decision dated 14 March 2017.

50. I remake the decision dismissing the appellant's appeal under Art 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 30 May 2017

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, no fee award can be made.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 30 May 2017