



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02785/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26th July 2018

Decision & Reasons Promulgated
On 3rd August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

DAVID IFEOLUWA SHAFE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Rahman, Legal Representative, Londonium Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by David Ifeoluwa Shafe who was born on 19th November 1984 and is a citizen of Nigeria. He appeals the decision of Judge Buckwell promulgated on 12th April 2018, dismissing his appeal against the Respondent's refusal of his application for leave to remain in the United Kingdom on private/family life grounds.
2. The background to this appeal can be summarised as follows. The Appellant entered the UK in May 2005 with limited leave as a visitor. On expiry of that leave he failed to leave the UK, made no attempt to regularise his stay and has since remained here unlawfully.

3. The Appellant said that he had entered a relationship with his partner, Esther Shafe “the Sponsor”, in June 2015 and that they were married by way of a traditional marriage ceremony at the Redeemed Church of God on 20th June 2015. They have since regularised their relationship and a marriage certificate shows that the Appellant and Sponsor were married at Peterborough Register Office on 12th January 2018.
4. The Sponsor is a British citizen and she has one child from a former relationship. The child is now aged around 11 years.
5. On 1st August 2016 the Appellant applied for leave to remain on the basis of his relationship with the Sponsor and the Sponsor’s child. The application was refused on 31st January 2017 because the Respondent was not satisfied that the relationship was a genuine and subsisting one and, in any event, the Appellant could not meet the requirements of the Immigration Rules.
6. The Appellant appealed the decision to refuse the application and by the time of the appeal before Judge Buckwell, the Sponsor had given birth to the Appellant’s child. The child was born on 12th May 2017.
7. The Respondent had refused the Appellant’s application under the Immigration Rules essentially on two grounds:
 - (a) The parties had not cohabited for a continuous period of two years at the time of the application. This brought into question the genuineness of the relationship. In addition the Appellant did not qualify under the Rules as a partner in a relationship akin to marriage. So far as the genuineness of the relationship is concerned Judge Buckwell found that that the Appellant and Sponsor are in a genuine relationship. There has been no challenge raised to that finding and therefore it stands.
 - (b) The Appellant has remained in the UK unlawfully (for a considerable amount of time) and was therefore required to make the appropriate application for entry clearance from Nigeria.

The Appellant appealed that refusal and the matter came before the First-tier Tribunal.

8. In a lengthy and detailed decision, Judge Buckwell acknowledged that the birth of the Appellant’s child on 12th May 2017 was a factor that had not been taken into account in the Respondent’s decision letter, since the decision letter predated the birth. It is equally clear that the judge kept this factor very much in mind when making his decision as he makes numerous references to this throughout the decision itself.
9. The judge found:
 - (a) He was satisfied that the Appellant and Sponsor were in a genuine and subsisting relationship.
 - (b) The Appellant did not meet the requirements of the Immigration Rules as there was no evidence that he and his partner would face significant difficulties or hardship in relocating to Nigeria.

- (c) It would not be unreasonable to expect the Appellant to return to Nigeria and make an application for entry clearance there; such a return could be on a temporary basis. He dismissed the appeal.
10. Permission to appeal the decision was granted by Judge Beach, on grounds that Judge Buckwell had arguably erred by failing to properly apply the principles contained in Section 117B(6) of the Nationality Asylum and Immigration Act 2002 and in Chikwamba, when assessing whether it was proportionate to expect the Appellant to return to Nigeria to make an entry clearance application. Thus the matter comes before me to decide initially whether the decision of Judge Buckwell contains such error of law that it must be set aside and remade.

Error of Law /UT Hearing

11. Before me Mr Rahman appeared on behalf of the Appellant and Mr Bramble for the Respondent. At the outset of the hearing Mr Rahman sought to adduce further evidence. This was in the form of a medical report on the Appellant's child. The report shows that the child has been diagnosed with two small holes in her heart. She is however otherwise well and thriving and the prognosis is that they should not cause significant problems. Mr Bramble objected to Mr Rahman's application on the grounds that this is later evidence that was not before the FtT. The judge could not be said to be in error for not considering evidence which was not before him. I agreed with Mr Bramble and declined to admit this evidence.
12. Mr Rahman's submissions centred on saying that he relied upon Grounds 2 and 3 of the grounds seeking permission and that any removal of the Appellant, even on a temporary basis, would be a disproportionate interference with his family/private life. His wife works full-time and the Appellant is the one responsible for looking after the children in the daytime. It would not be right for the Appellant's stepchild to have to relocate to Nigeria, even temporarily, as that child is a British citizen. The youngest child is just over a year old and has a close bond with her father.
13. Mr Rahman submitted further that the FtTJ had made no reference to Chikwamba which, he said, is the guiding case in these matters. If the Appellant meets the requirements of the Immigration Rules for entry, it would be a disproportionate interference with his Article 8 rights, and those of his family members, to remove him.
14. Mr Bramble in response referred to the decision itself. He pointed out that this was a very thorough and carefully set out decision. The judge's note of the evidence and submissions made is set out in lengthy paragraphs [17 to 60]. He submitted that it simply could not be argued that the judge had failed to consider all the relevant factors. The judge was clearly fully aware of all the issues before him.
15. Mr Bramble drew my attention to [63], wherein the judge specifically directs himself on Section 117B of the 2002 Act. He submitted that it was not right to say that the judge had failed in some way to address the position of the Appellant's child and stepchild in the proportionality exercise. The judge had noted the Sponsor's evidence which was that if the Appellant returned to Nigeria the family would not be split up [54]. In addition the Sponsor had confirmed that she would support the Appellant in his

application for entry. A proper reading of the decision showed that the judge kept these factors very much in mind. In this regard, Mr Bramble specifically referred to [18], [22], [40], [44], [55] and [56].

16. Mr Bramble said he accepted that the judge did not specifically refer to **Chikwamba** by name, but he is not obliged to do so provided the principles contained therein have been factored into the proportionality consideration. A fair reading of the decision showed that those factors had been considered. The findings of the FtT are wholly sustainable and the appeal should be dismissed.
17. At the end of submissions, I announced my decision that I was satisfied that the decision of Judge Buckwell disclosed no error of law sufficient to require it to be set aside and remade. I now give my reasons for this finding.

Consideration

18. I find that the grounds seeking permission are not made out. It has been suggested that the FtTJ has failed to follow the guidance in **Chikwamba**, and has not had regard to Section 117B(6) of the 2002 Act. I disagree. In a lengthy and detailed decision, the FtTJ has, I find, taken into account all the evidence which was placed before him, including the circumstances of the Appellant's child and stepchild. I find that all relevant factors have been considered and that the judge has demonstrated that he was fully aware of all factors.
19. Cases of this nature depend upon a consideration of all the circumstances taken as a whole. This includes a consideration of the circumstances in which the Appellant came to be in the United Kingdom unlawfully, the period of time that he has been in the United Kingdom unlawfully and the public interest which arises from ensuring that those who are here unlawfully satisfy the requirements of the Immigration Rules.
20. In the consideration of proportionality, the judge was looking at all of the factors which might be said to be in favour of the Appellant being granted leave to remain without formally meeting the requirements of an application for entry clearance made out of country. He was aware that the Appellant now has a one-year-old daughter and a stepchild. He considered at some length the position of the Appellant's wife and the two children.
21. The judge found at [74] that the best interests of both children were to remain in the UK together with their mother. This was on the basis that the return of the Appellant to Nigeria could be on a temporary basis. However he also took into account the Sponsor's evidence that the family would not be split up and she would support him in an application for entry. The judge found that the Sponsor's documentary evidence relating to her earnings were unclear, but noted that in her oral evidence it was maintained that she had more than sufficient funds for the Appellant to meet the minimum income requirements.
22. Equally there was no question of the Appellant's child and stepchild being forced to relocate to Nigeria [75]. Their family could remain in the UK with their mother pending a proper application for entry clearance being made.

23. In short when looking at the consideration of proportionality, the judge looked at all the factors. He determined that in this case, the public interest which arises from ensuring that those who are here unlawfully satisfy the requirements of the Immigration Rules outweighed the other factors put forward. Essentially that was a matter for the judge to determine and I am satisfied that the decision and findings made were ones which were reasonably open to him. The grounds seeking permission amount to no more than a disagreement with those findings.
24. For the foregoing reasons therefore I find there is no material error of law disclosed in the FtT's decision. The decision therefore stands.

Notice of Decision

The appeal before the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal promulgated on 12th April 2018 stands.

No anonymity direction is made.

Signed C E Roberts Date 01 August 2018

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

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

Signed C E Roberts Date 01 August 2018

Deputy Upper Tribunal Judge Roberts