Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/03252/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 9 April 2018	**On: 18 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR VICTOR NNAOMA DURU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr F Khan of Counsel
For the respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 9 February 1971. He appealed to the First-tier Tribunal against the decision of the respondent dated November 2016 to refuse to grant him leave to remain in the United Kingdom under paragraph 276ADE and Article 8 of the European Convention on Human Rights. First Tier Tribunal Judge Devittie dismissed the appellants' appeal in a decision dated 5 May 2017.

2. Permission to appeal was granted by First-tier Tribunal Judge JM Holmes on 11 January 2018 stating that it is arguable that the Judge's approach was arguably wrong in law in respect of her understanding of the appellant's immigration history and it is arguable that the appeal has not received the consideration that the appellant and his family were entitled to.

First-tier Tribunal's findings

3. The Judge made the following findings in his decision which in summary are the following.

I. The appellant claims to have arrived in the United Kingdom in February 2007 and on 20 October 2015 he applied for leave to remain claiming he had established a family life in the United Kingdom. The respondent refused the appellant's application and stated that the appellant met the suitability requirements under the immigration rules but did not meet the eligibility requirements because his partner was in the United Kingdom unlawfully and in order to qualify for leave to remain, his partner must either be a British citizen, a person settled in the United Kingdom or be in the United Kingdom with leave. As his partner did not fulfil these requirements, the appellant in turn failed to qualify under the immigration rules. The respondent also considered that paragraph EX1 did not apply to the appellant because there would be no significant obstacles to the appellant and his family integration into Nigeria.

II. The appellant's wife did not give evidence in support of the appeal. She did not provide written evidence either. The evidence to show cohabitation at the address of the family unit is hardly adequate. The appellant has not provided any explanation for his wife's failure to give evidence. I can only summarise, from counsel submissions on the point, that she wishes to have a second bite at the cherry in the event that this appeal fails. There are no details of her identity. On these alone along the appellant's Article 8 claim is bound to fail.

III. I proceeded however to consider the appeal on the basis that there does exist family life between the appellant and his biological children. The appellant now asserts that he has four children and it does concern me that it was only at a late stage in this appellant's immigration history that the claim to have children in the United Kingdom first surfaced as a basis for seeking leave to remain. Be that as it may, the respondent does not challenge this aspect of the claim and I shall therefore proceed on the basis that the appellant is the father of the children born in the United Kingdom. I accept therefore the appellant's removal would interfere with his right to a private and family life.

IV. I must first consider the best interests of the appellant's children as these are a primary consideration as set out in the case of **ZH Tanzania**. The following factors have been considered in that assessment. The children were born on 9 November 2011, 18 March 2013, 20 February 2016 and 5 February 2017 respectively. They are aged 6, 4, 1 and 5months. They have not lived in the United Kingdom for seven years. They are in my view at an age when they can adapt with relative ease to life in Nigeria. The process of their adapting to life in Nigeria will be greatly facilitated by the fact that the appellant and his spouse are Nigerian nationals who grew up in Nigeria and at least in the case of the appellant, arrived in the United Kingdom when he was well into his

adult life. He has been in the United Kingdom for about 10 years and he would not have lost his cultural ties. The appellant attained a degree in economics before he arrived in the United Kingdom and he has furthered his education in the United Kingdom and prior to his arrival in the United Kingdom he held what he describes as a good job as the cartographer. The appellant does therefore have reasonable prospects of employment in Nigeria.

V. It is accepted that his two older children suffer from speech and language difficulties and are receiving therapy. It has not been suggested that their condition could not be treated in Nigeria as it clearly can. The children's interests will not be compromised by their return to Nigeria with their parents.

VI. The appellant's claim that he faces harm from persons from whom he borrowed money in Nigeria is an afterthought that he has contrived to prolong his stay in the United Kingdom. There is not any credible evidence to support this claim and the letters that he provided from his alleged creditors lacked a ring of truth and clearly addressed to him at his instance and for the purpose of producing them in his appeal.

VII. The respondent's delay must be considered in the balancing exercise when considering proportionality. Two key points made by the appellant are that the respondent's failure to accurately record his name in his April 2009 application meant that his application was rejected. Secondly, he asserts that in the second application for leave to remain as a student, the respondent declined to consider his application. Thirdly, he complains that after his arrest in 2011, having been encountered by immigration officials, he was persuaded to withdraw his application for judicial review by the respondent on the bases that he would be granted a right of appeal in respect of his human rights claim. He complains that there was a delay of four years before the respondent gave substantive consideration to his claim.

VIII. I accept that the delay of four years after his arrest in 2011 has not been satisfactorily explained by the respondent. There are however countervailing considerations that do not weigh in the appellant's favour. After the refusal of the first application in April 2009, on grounds that his payment was invalid, he did not make a second application for leave as a student until several months later in October 2009. Furthermore, the refusal of his application in October 2009 was on the ground that he had failed to provide the required test certificates which the appellant does not dispute. He was not granted a right of appeal because his application was well out of time. I also take into account that after the refusal of his application October 2009, with no right of appeal, there is no evidence to show that he took any steps to regularise his stay. He was content, it seems, to let matters rest as they were until his arrest in 2011, which prompted him into action that has culminated in the present proceedings.

IX. In conclusion having regard to all relevant considerations is that the consequences of the appellant's removal would not be sufficiently serious to outweigh the compelling need in the public interest to maintain effective immigration control by securing the removal of the appellant from the United Kingdom.

X. The Judge dismissed the appellants appeal under the Immigration Rules and under Article 8.

Grounds of appeal

4. The appellant in his grounds of appeal states the following which I summarise. The appellant arrived in the United Kingdom on a student visa valid from April 2007 until April 2009. He made an application on 26 March 2009 for leave to remain as a student, but this was refused on the basis that the appellant failed to pay the required application fee. In fact, what transpired was that the Home Office when processing the credit card payment mistakenly spelt the appellant's surname incorrectly and as a result the bank refused to authorise the payment. The application was invalidated, and the appellant sought to renew the application for leave to remain no fewer than on five occasions in 2009 all of which were rejected for some reason or other. Some of the applications were refused for non-submission of documents. The appellant's representatives wrote to the Home Office to resolve matters on 22 October 2009 and the Home Office delayed matters until 19 January 2011, when she served him with notice IS 151A and detained him as a person liable to removal.

5. Thereafter there were judicial review proceedings challenging the same which were withdrawn by consent on 12 July 2011 on the condition that the Home Office review the appellant's case and if refusal was maintained to grant him an in country right of appeal. The appellant did not hear from the Home Office for about six months after which the appellant wrote to the Home Office to ascertain if she was still willing to honour her promise but there was no response until 13 October 2014.

6. At paragraph 15 of the determination it is incorrectly recorded that after the appellant's first application was rejected as being invalid in 2009 and there is no evidence that took any steps to regularise his immigration status. The Judge's premise is not only factually incorrect, but this perception of the appellant's immigration history has unfairly and adversely affected the outcome of the appeal. The appellant's immigration history demonstrates that the appellant, far from having a laid-back approach to his case, in fact was diligent and instructed lawyers to assist him in resolving the same. The Judge ignored the impact of the delay by the Home Office when accepting that the respondent's delay has not been satisfactorily explained. The appellant will rely on the case of **Akaeke [2005] EWCA Civ 947** in support of the proposition that delay in dealing with the case can prevent the Home Office from relying on the full rigour of the law in deciding the case against the interest of the appellant who is affected by that delay.

7. In light of the above it is arguable that the First-tier Tribunal Judge further erred in law in dismissing the appellant's case under Article 8. Erred in law in dismissing the

appellant's case under article 8. A proper analysis based on the current jurisprudence in particular **MF (Nigeria) [2012] UKUT 393** and **Izuazu (article 8 – new rules) [2013] UKUT 00045** where the approach was endorsed by the Court of Appeal in the case of **MF Nigeria 2013** that should have yielded a different decision favourable to the appellant.

8. The First-tier Tribunal Judge failed to take into account that the appellant developed his private and family life at a time when the Home Office delayed in deciding his case. The appellant is a person of good character and has not behaved in a morally or socially unacceptable manner whilst he has been in this country.

9. The best interests of the children pursuant to s55 of the Boarder's Citizenship and Immigration Act 2009 were given insufficient weight in that two of the appellant's children suffer from speech impediments for which treatment and therapy in Nigeria comes at a financial premium, if at all and the appellant simply does not have the resources to afford the same.

10. The appellant himself suffers from acute diabetes and he would not have the financial resources to meet the costs of the medication to keep the disease under control if he were returned to Nigeria. The family are absolutely devoted to each other in the United Kingdom. It is the only place that they can enjoy family life as they have no resources in Nigeria and have no one to whom they can reasonably rely on for support.

The hearing

11. I heard submissions from both parties at the hearing which I have taken into account.

Decision on error of law

12. In considering this appeal I have taken into account the case of **R (Iran) v SSHD [2005] EWCA Civ 982**, where Brooke LJ summarised at [9] the errors on points of law that will most frequently be encountered in practice:
"9. …
(i) making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
(ii) failing to give reasons or any adequate reasons for findings on material matters;
(iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
(iv) giving weight to immaterial matters;
(v) making a material misdirection of law on any material matter;
(vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
(vii) making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

13. The First-tier Tribunal Judge in a careful decision considered all the evidence in the appeal and found that the appellant, his spouse and four children could return to Nigeria and continue their private and family life in that country, as a family unit.

14. The complaint against the First-tier Tribunal Judge is that he fell into material error when he was inaccurate when considering the appellant's immigration history. It was asserted that Judge fell into material error when he stated in his decision that after his first application was refused on the basis that the fees were not paid which was due to the respondent's fault, the appellant "was content to let matters rest as there were until his arrest in 2011. The appellant asserts that this is inaccurate because "in 2009, he made further applications for leave to remain no fewer than on five occasions in 2009 all of which were rejected for some reason or other. Some of the applications were refused for non-submission of documents".

15. It is clear from the grounds of appeal with state that the appellant's further applications were refused "for some reason or other" this demonstrates that there were considered by the respondent and rejected. It is the case that one application was refused on the basis that the respondent made an error by misspelling the appellant's name and his application fees was not honoured by the bank. There were however other applications made which were also refused for non-submission of documents. The First-tier Tribunal Judge noted "Furthermore, the refusal of his application in October 2009 was on the ground that he had failed to provide the required test certificates which the appellant does not dispute. He was not granted a right of appeal because his application was well out of time".

16. The Judge made an error by stating that the appellant was content to let matters rest when he had in fact made further applications which were all rejected for one reason or the other. I however can say with confidence that despite the First-tier Tribunal Judge stating that the appellant content to let matters rest, the decision would inevitably have been the same on the facts of this appeal. I say this because the mistake was not material to the issue that the First-tier Tribunal Judge had to decide. The issue for decision was whether requiring the appellant and his family's return to Nigeria would be in breach of the immigration rules or Article 8 of the European Convention on Human Rights.

17. Therefore, even if there was an error it was not material and no unfairness resulted from the fact that a mistake was made on the First-tier Tribunal Judge when she formed the view that the appellant had been lackadaisical in regularising his immigration status.

18. The appellant further complains that the respondent's delay of four years in deciding the appellant's application from 2011 until 10 February 2015 stops the respondent from relying on the full rigour of the law in deciding the case against the interest of the appellant who has been affected by that delay. The grounds of appeal however do not say how the interests of the appellant were affected or how he was prejudiced by this delay other than he had children in this country. The mere fact that there is a delay by the respondent does not in itself mean that the proportionality assessment

invariably will go in favour of the appellant and that he should get the benefit of the doubt. The First-tier Tribunal Judge noted that respondent accepts that there was a delay but has not been able to explain it. Therefore, the Judge did take into account the respondent's delay.

19. In the case of **EB (Kosovo), JL (Sierra Leone) [2006] EWCA Civ. 1713** to clarify the law on the effect of delay by the Secretary of State on claims that rely on Article 8 to resist removal from the United Kingdom. Buxton LJ summarised the law in relation to delay at paragraph 24 as follows:

> "i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within article 8(1). That however is a question of fact, and to be treated as such.
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> ii) The application to an article 8 case of immigration policy will usually suffice without more to meet the requirements of article 8(2) [*Razgar*]. Cases where the demands of immigration policy are not conclusive will be truly exceptional [*Huang*].
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> iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in *Shala* and *Akaeke*); and persons who have no such right.
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> iv) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [*Akaeke*], to enforce those procedural rules [*Shala; Akaeke*]
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> v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome [*Strbac at para. 25*].
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> vi) The mere fact that delay has caused an applicant who now has no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR does not in itself affect the determination of a subsequent article 8 claim [*Strbac, at para. 32*].
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> vii) And further, it is not clear that the court in *Strbac* thought that the failure to obtain ELR on asylum grounds because of failure to make a timely decision could *ever* be relevant to a decision on the substance, as opposed to the procedure, of a subsequent article 8 claim. Certainly, there is no reason in logic why that fact alone should affect the article 8 claim. On this dilemma, see further para. 6 above.
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> viii) Arguments based on the breakdown of immigration control or of failure to apply the system properly are likely only to be of relevance if the system in question is that which the Secretary of State seeks to rely on in the present proceedings: for instance, where a procedural rule of the system is sought to be enforced against the applicant [*Akaeke*]. The same arguments do not

follow where appeal is made in article 8 proceedings to earlier failures in operating the asylum system.

ix) Decisions on proportionality made by tribunals should not, in the absence of errors of principle, be interfered with by an appellate court [*Akaeke*].

20. Laws LJ then when on to make it clear that there is no 'rule to the effect that an applicant whose claim to enter or remain (a) is decided after the expiry of a reasonable time and (b) would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, should, if he has meantime established a family life here, be treated as if it had been so decided'.

21. It was implicit in the decision that the First-tier Tribunal Judge found the appellant has not established that his claim for leave to remain would have succeeded or have had a greater chance of succeeding if it had been decided earlier. The children that he had in this country are not qualifying children and are Nigerian citizens. The delay if anything, allowed the appellant to have children in this country had the respondent not delayed in deciding his application and removed him from this country. it cannot be said that four years delay is a national disgrace or of the system having broken down. The First-tier Tribunal Judge was entitled to find that the respondent's delay did not affect his proportionality assessment.

22. The First-tier Tribunal was entitled to find that all the appellant and family can return to Nigeria and continue their family and private life in that country of which they are citizens. The First-tier Tribunal Judge found that the appellant worked in Nigeria before he came to this country and he can look after his children by finding employment. It was found that the children's speech impediment can be managed in Nigeria. The First-tier Tribunal Judge understood the evidence and found that the best interests of the children must inform her decision. There is no perversity in the findings made that the appellant and his family can return to Nigeria and can integrate. The appellants appeal is no more than a quarrel with the First--tier Tribunal Judge's findings which she was entitled to make on the evidence.

23. The upshot is that the decision of the First-tier Tribunal is not affected by a material error and I find that the First-tier Tribunal did conduct a proper assessment of all the appellants' and his children's rights pursuant to the Immigration Rules and Article 8.

24. I find that there is no material error of law in the decision of First-tier Tribunal and I uphold the decision dismissing the appellant's appeal.

Conclusions

25. I therefore find that the appellants appeal must fail pursuant to the Immigration Rules and Article 8 of the European Convention on Human Rights.

DECISION

The appellant's appeal is dismissed

I make no anonymity orders
The appeal has been dismissed and there can be no fee order

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana Dated 18th day of April 2018