



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06480/2016

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2018

Decision & Reasons Promulgated
On 25 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MR JOSEPH OLADENI FADEYI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Childs, Counsel instructed by D F Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal from the decision of First-tier Tribunal Judge O'Rourke promulgated on 30 November 2017. The appellant is a citizen of Nigeria whose date of birth is 25 September 1974. The sponsor is his wife who is a British citizen born on 3 November 1962. The appellant made an application for leave to remain in the United Kingdom on 29 December 2015. This was refused by the Secretary of State on 17 February 2016.

An appeal was brought relying on the terms of the Immigration Rules and Article 8 outside the Rules.

2. The decision of Judge O'Rourke sets out the legal principles involved and a summary of the submissions made on the part of the appellant and of the Secretary of State. The findings of fact commence at paragraph 18. The appeal was rejected under paragraphs EX.1.(b) and paragraph 276ADE on the basis that there were no obstacles to reintegration in Nigeria. There is no challenge to these findings.
3. Permission to appeal, however, was granted in relation to the judge's conduct of the proportionality assessment under Article 8 outside the Rules. The reasons state:

"It would appear that the Judge accepted that the only reason the Appellant failed to meet the requirements of the Immigration Rules for the grant of leave for which he had applied, was his unlawful presence in the United Kingdom. It is well arguable that the Judge misdirected himself in relation to the principles to be found in Chikwamba [2008] UKHL 40, Hayat [2012] EWCA Civ 10 and Agyarko [2017] UKSC 11. Arguably the suggestion that the decision in Chikwamba was an exceptional one, confined to its own facts, displayed a failure to understand and apply the relevant principles. Arguably the Judge failed to bear in mind that the Appellant's spouse and child were British citizens, and that he had accepted that the Appellant had met the requirements of the Immigration Rules for a grant of entry clearance as spouse/parent, should he have made one at the date of the hearing. That raised the question of whether the public interest required such an application to be made, when there were no matters relied upon by the Respondent to indicate that there was an enhanced public interest in the Appellant's removal."

4. Ms Childs who acts for the appellant today has made detailed submissions developing this ground. She submits there was a material error of law in the way the judge dealt with the proportionality assessment, not least the judge's apparent failure to understand the full meaning and effect of **Chikwamba (FC) v Secretary of State for the Home Department** [2008] UKHL 40, as summarised in paragraph 26(iii) of the First-tier decision.
5. Miss Childs directs me to two passages in the opinions of the House of Lords in **Chikwamba**. In paragraph 44, Lord Brown of Eaton-under-Heywood states:

"I am far from suggesting that the Secretary of State *should* routinely apply this policy in all but exceptional cases. Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad."

Further, at paragraph 36 there is a citation of **SB (Bangladesh v Secretary of State for the Home Department)** [2007] EWCA Civ 28, and Lord Brown's opinion continues:

“It would be ‘paradoxical’ if the stronger the appellant’s case for entry clearance under the rules, the more appropriate would it be to remove him.”

6. Mr Tufan, who acts for the Secretary of State, has referred me to the decision of the Supreme Court in **Regina (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11** and taken me to the judgment of Lord Reed, in particular at paragraph 51, which reads as follows:

“Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were 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.**”

7. It is apparent that Lord Reed is emphasising that the decision in **Chikwamba** is illustrative rather than determinative. Perhaps in rather less elegant language, this is what the First-tier Tribunal Judge in this matter was seeking to convey in paragraph 26(iii).
8. Ms Childs suggests that the judge misstated and misconstrued the decision in **Chikwamba**. I consider this to be an unfair criticism. The judge has succinctly made reference to the kernel of the decision and indicated in clear terms that cases of this nature are highly fact specific, and capable of being distinguished on their facts.
9. Ms Childs makes criticisms of the proportionality balancing exercise which the judge undertook. She submits that paragraph 22 does not properly deal with the issues relating to the step-children of the appellant. She further submits that paragraph 24 reveals a misapprehension as to the potential implications of economic wellbeing. In her submission there are features in this case which militate in favour of the appellant but are given insufficient weight. She states that the judge placed undue weight on the poor immigration history of the appellant, notwithstanding he has been attempting to regularise the position for some time.
10. Decisions of the First-tier Tribunal need to be read holistically. Judges are not required to deal extensively with every single fact and matter raised or potentially raised on the evidence. Reading this decision in its totality, I can find no error of law in the manner in which the judge approached the case. The judge was clearly aware of each and all of factors in play in the proportionality exercise, which follows the fact-finding. The judge noted the importance of maintaining effective immigration control; the fact that the appellant spoke English and was financially independent. The judge additionally

had regard to the fact that little weight attaches to a private life established while an individually has been in the United Kingdom unlawfully. The judge noted at paragraph 26(ii) that the appellant himself considered that an entry clearance application made on his return to Nigeria might not be granted.

11. It is conceivable that another judge may have come to different conclusion. But Ms Childs has failed to persuade me that there is any error of law in the determination. In the circumstances the appeal must be dismissed.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed *Mark Hill*

Date

21 June 2018

Deputy Upper Tribunal Judge Hill QC