



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/10213/2016
HU/10215/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2018**

**Decision & Reasons Promulgated
On 26 February 2018;**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MR BABADTUNDE AKINOLA ODERINDE

(2) MISS GHEMI NAOMI ODERINDE

Respondents/Claimants

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondents: Ms S Fergusson, Counsel instructed by Okafor & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Samina Iqbal sitting at Hatton Cross on 11 September 2017) allowing on Article 8 ECHR grounds outside the Rules the claimants' appeals against the decision of the Secretary of State to refuse to grant them leave to remain on family or private life grounds. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimants require anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 21 November 2017, First-tier Tribunal Judge Ford granted the Secretary of State permission to appeal for the following reasons:
 - (2) It is arguable that the Tribunal erred in (a) finding that if the first appellant were a female and the primary carer of a minor child he would have been granted leave to remain; (b) apparently accepting that the first appellant had lost all ties to Nigeria, despite his arrival in the UK being in 2011; (c) apparently accepting the first appellant was gay, although he had not disclosed this in any previous applications (including as the unmarried partner of a female EEA national) and had only disclosed it at the hearing; (d) concluding that the first appellant was self-supporting contrary to the evidence that he had amassed debts of £23,000 in the UK..
 - (3) It is arguable that these findings were not supported by the evidence and/or adequate reasoning.

Relevant Background

3. The claimants, who were appellants in the First-tier Tribunal, are nationals of Nigeria. The first claimant last entered the UK on 16 March 2011 with entry clearance as a Tier 4 (General) partner. He extended his stay as a Tier 1 (highly skilled dependant) partner until 4 January 2014.
4. On 5 November 2013, the first claimant submitted an application for an EEA residence card as the family member of an EEA national who was exercising Treaty rights in the UK. The application was refused, and he lost his appeal against the refusal. He was appeal-rights exhausted as of 23 October 2014.
5. On 17 November 2014 the first claimant applied for leave to remain on family and private life grounds, and the second claimant (whose date of birth is 27 July 2011) joined in his application as his dependent child. The application was refused with no right of appeal on 29 January 2015. On 6 October 2015 the claimants were issued with RED.0001 notices. On 22 October 2015 the claimants submitted a statement of additional grounds, which was refused on 29 March 2016 with a right of appeal.
6. It was accepted that the first claimant had a genuine and subsisting parental relationship with the second claimant. However, Gbemi was not a British citizen, nor had she lived in the UK continuously for at least 7 years immediately preceding the date of application. Moreover, it was reasonable to expect her to leave the UK with him. She was not at a critical stage of her education, and going to Nigeria with her father at such a young age, where he sole focus in life at this point was her immediate family, would not have a detrimental effect upon her. It was considered to be in her best interests to remain within the family unit, which would not be hindered by way of a family removal.
7. A decision had been made on whether the particular circumstances set out in his application constituted exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 ECHR, might warrant

consideration by the Secretary of State of a grant of leave to remain in the UK outside the requirements of the Rules. He stated that his daughter's mother, Temitope Balogun, was the spouse of a settled refugee, and she had leave to remain in this capacity until 16 October 2014. However, he had not provided sufficient evidence to show that the mother's relationship with his daughter was genuine and subsisting. He had provided no documentary evidence of this, other than a letter dated 21 October 2015 from his daughter's school, stating that they were aware that his ex-partner picked her up on a Wednesday, and four undated photographs. The onus was on him to provide sufficient evidence to show that his ex-partner played an active role in the upbringing of his daughter.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. Both parties were legally represented before Judge Iqbal. The Judge received oral evidence from the first claimant.
9. In her subsequent decision, the Judge recorded at paragraph [17] that at the outset both representatives agreed that neither of the claimants could satisfy the Immigration Rules under Appendix FM or with reference to Rule 276ADE.
10. The Judge went on to consider an Article 8 claim outside the Rules. At paragraph [19], she found that there was family life between the second claimant and her birth mother, as there was some evidence of contact between them and the first claimant's evidence today was that she had not attended the hearing because she was ensuring that their daughter was picked up from school.
11. At paragraphs [24]-[31], the Judge considered the best interests of the second claimant. She held that it was clear that the parent who had relevant leave had a genuine and subsisting relationship with the second claimant, and appeared to have an active role in the upbringing of her child. It was not suggested that the mother could continue family life in Nigeria with her child, given her current status and her new relationship. In the circumstances, she found that it was in the second claimant's best interests to remain in contact with her mother in the UK. The Judge continued in paragraphs [32] as follows:

"I therefore go on to consider matters relevant to the balancing act under [sic] addressing the issue of proportionality. The following matters were highlighted on behalf of the Appellant, which I take into account:

- The Appellant has no links to Nigeria, his only tie was in the form of his mother who had brought him up as a single parent and who has now passed.
- After a number of years in the United Kingdom he accepted he was gay. This would cause a number of difficulties with his day-to-day life in Nigeria which would directly affect his daughter as he was not supported by friends in Nigeria and they had instead threatened him for coming out.
- He had a very large network of friends in the LGBT community and support from them in the United Kingdom.

- The Appellant had financially supported himself through loans and credit cards after he was not allowed to work in the United Kingdom and unfortunately had built up a debt of £23,530 which he intended to pay when granted permission to work in the United Kingdom.”

12. At paragraph [35], the Judge said that this was a finely balanced case. However, the totality of the claimants’ circumstances led her to conclude that removal in their case would certainly cause a disproportionate breach of their family and private life.

The Hearing in the Upper Tribunal

13. At the hearing before me to determine whether an error of law was made out, Mr Kotas developed the arguments advanced in the grounds of appeal. In reply, Ms Fergusson submitted that some of the criticism of the Judge’s line of reasoning was unfair; and, on a holistic assessment, there were no material errors in the Judge’s findings or conclusions.
14. Having heard from Ms Fergusson in reply, I ruled that an error of law was made out. I gave my reasons for so finding in short form, and my full reasons are set out below.

Reasons for Finding an Error of Law

15. As I ruled at the hearing, the main flaw in the Judge’s decision is that she failed to grapple with the glaring inconsistency between, on the one hand, the acceptance by the representative for the claimants that Rule 276ADE did not avail them; and, on the other hand, the adoption of a case that the first claimant had no links to Nigeria, and that he would face a number of difficulties in his day-to-day life in Nigeria on account of his homosexuality.
16. The Judge was required to apply the Rules as they stood at the date of the hearing, not the date of decision. In accepting that Rule 276ADE did not apply, the representative for the claimants should have been treated by the Judge as accepting that there were not very significant obstacles to the re-integration of the claimants into life and society in Nigeria. The Judge should then have directed herself that it was not open to the first claimant to perform a *volte-face* for the purposes of an assessment outside the Rules, and in effect contend that there were very significant obstacles to his re-integration into life and society in Nigeria on account of his homosexuality and/or on account of an alleged total absence of a support network.
17. It is apparent that the Judge’s findings in paragraph [32] on the difficulties that would be encountered by the first claimant on return to Nigeria had a material bearing on her conclusion that the removal of the claimants would be disproportionate. Accordingly, it is unnecessary for me to comment on the other criticisms of the Judge’s approach which are identified as arguable in the grant of permission. The decision is clearly vitiated by a material error of law, such that it must be set aside in its entirety and remade.

18. I am also satisfied that the nature of the error made by the Judge is such that the Secretary of State was deprived of a fair hearing in the First-tier Tribunal. Accordingly, as I ruled at the hearing, this is an appropriate case for remittal to the First-tier Tribunal for a *de novo* hearing, with none of the findings of fact made by the Judge being preserved.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside.

Directions for Future Disposal

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Iqbal.

None of the findings of fact made by Judge Iqbal shall be preserved.

My time estimate for the fresh hearing is 2 hours.

Signed

Date 17 February 2018

Judge Monson
Deputy Upper Tribunal Judge