Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15408/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 November 2018	**On 30 November 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

EKUNDAYO OLUSEGUN OLATUNBOSUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson of Counsel instructed by Paul John & Co Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 21 June 1962. The appellant applied for leave to remain under Appendix FM on the basis of his family life with his partner on 19 July 2016. The appellant claimed to have

entered the UK in March 2007 with entry clearance as a visitor. However, the Secretary of State noted in refusing the application on 14 November 2017 that there was no record of the appellant having gained valid entry clearance to the UK and records show that he was refused entry clearance as a visitor on 5 November 2004. The Secretary of State concluded that the appellant did not meet the requirements of the Rules. It was not accepted that there were insurmountable obstacles which would be faced by the appellant or his partner in continuing family life together outside the UK in Nigeria. It was acknowledged that the appellant's partner was a British citizen following naturalisation in 2006 and that she was employed in the UK as a nurse. The appellant's partner was born in Nigeria and spent her formative years residing there. The couple had no children and accordingly paragraph EX.1.(a) did not apply. The appellant did not meet the residential requirements of the Rules and there would be no very significant obstacles to his integration into Nigeria if required to leave. There were no exceptional circumstances.

2. The appellant appealed and his appeal came before a First-tier Judge on 7 August 2018. The judge heard oral evidence from the appellant and his partner. The appellant said he had married his partner on 18 August 2016 having met her in 2012. When he had arrived in the UK he had not used his own passport and he realised that he did not have legal status to remain in the country. He claimed he was advised by his lawyer that it was advisable for him to have returned to Nigeria and to make a fresh application to come back into the country. The appellant's wife confirmed that the relationship between her and her husband was genuine and subsisting and gave evidence about her health problems and the difficulties she would face if she were to go back to Nigeria. She had visited Nigeria in 2018 and 2017. In submissions the Presenting Officer pointed out there was no evidence to suggest that the appellant's wife had no ties in Nigeria as she had spent 35/36 years of her life there. The appellant had spent 44 years of his life in Nigeria. The case could be compared with that of **Agyarko [2017] UKSC 11** where the facts were similar but the appeal had been dismissed. It was in the public interest under Section 117B of the Nationality, Immigration and Asylum Act 2002 for the appellant to be removed because he had a precarious immigration status and he had remained in the country illegally.

3. For the appellant it was submitted that there were insurmountable obstacles to prevent the appellant and his wife returning to Nigeria and if not, then there were exceptional circumstances outside the Rules given the circumstances and the age of the appellant's wife. The financial issues had been met alongside the English language requirements and if the appeal was not successful under the Rules it should be granted outside the Rules on proportionality grounds. The judge made the following findings in considering the appellant's case under the Rules:

> "23. I considered firstly whether the appellant could satisfy the requirements of the Rules. The respondent's are of the view that

the appellant could not satisfy Paragraph EX1 of the Rules because there are no insurmountable obstacles that would be present if the appellant and his wife were to return to Nigeria. The appellant has spent 44 years of his life in Nigeria and his 35 years they were of course both born in Nigeria and are accustomed to the culture and the way of life. The question is whether they would both be able to adjust bearing in mind that they have both been out of the country for a considerable period of time the appellant 11 years and his wife 27 years.

24. The appellant's wife has worked for the NHS and is on a pension and she states that she would not obtain a significant pension because her contributions are not significant I have no evidence before me on this point but she is still of working age at 63. The appellant wife has been recently visited Nigeria in the last year and she is familiar with the present conditions in the country. I am of the view that she would have a find it difficult to adjust but not to the extent that she would be faced with insurmountable obstacles. She would be able to adjust to the culture having spent so much of her life in her own country the difficulty of finding employment may be overcome but I have no evidence before me to suggest that she could not obtain employment in Nigeria. The appellant in my view would also be able to adjust he has always known that his stay in this country was not lawful and hence the possibility that he may have to return.

25. I then considered whether the appellant could satisfy the provisions contained in Paragraph 276ADE of the Rules. The appellant on his own evidence has been in this country for 11 years at the time of the decision and he cannot therefore satisfy the Rules because he has not resided in this country continuously for a minimum period of 20 years. I also considered that he would not face very significant obstacles if he were to return because he is familiar with the culture and the language and he has resided in Nigeria for a period exceeding 40 years".

The judge then considered matters outside the Rules applying the guidance in **Razgar v Secretary of State [2004] UKHL 27**. The judge concluded that Article 8 was engaged. The judge took into account public interest issues under Section 117B of the 2002 Act and concluded his determination as follows:

"29. In this instance the financial and English requirements is not in issue between the parties. The appellant has entered into a relationship with a qualifying person or to private life when a person has been in the UK illegally and little weight should be given to time acquired and to the relationship. This provision applies to the appellant because he has admitted to the appellant and I have therefore given little weight to the fact that

he has been in this country for a period exceeding 11 years and he has formed a private life in this country with his friends and family. I have therefore attached little weight to the relationships he has formed with his church community. The appellant also in my view could form similar links with a church in Nigeria.

30. The appellant also entered into the relationship with his wife whilst his immigration status was precarious it would have been apparent to both of them that the appellant may have to leave this country if he was encountered by the authorities or if he made an application and he was unsuccessful. It is in the public interest that individuals who arrived in this country illegally and remain here outside of the Rules should be removed. The appellant knowingly breached the Rules.

31. I then considered whether the decision of the respondent is proportionate. The appellant has been in this country for 11 years having entered as a visitor he claims in 2007 at the request of his brother. He admits that he has remained here unlawfully. It is not disputed that he has spent a significant part of his life in Nigeria. The appellant is therefore a person who culturally would be able to adjust to life in Nigeria.

32. The appellant's wife is a British citizen and she is currently employed with the NHS and is aged 63. Her main concerns are that she has her family and friends in this country and no relatives in Nigeria she like the appellant claims that they built their lives in this country and at their age it would be difficult for them to make a fresh start in Nigeria. It would be difficult for her to obtain employment or start again in Nigeria. It is also argued that she is employed by the NHS and that they are short of staff and that it would be in the public interest for her to remain in this country. She is also concerned about not being able to build her pension further. I am of the view that the appellant and his wife were both aware of the circumstances when they entered their relationship. They are both individuals who could adjust to life in Nigeria and indeed the evidence of the appellant's wife is that she visits Nigeria on a regular basis and she is aware of the culture and the present conditions of life in that country it is a matter for her whether she wishes to join her husband in Nigeria. The appellant and his wife do not have any children and the appellant's wife evidence is that she does not have any relatives in Nigeria her recent visits do suggest that she may have friends if not family. She has three sisters all of whom she claims are in America and both her parents are dead. I have taken into consideration the fact that the respondent does not take issue with the genuineness of the relationship of the appellant and his wife but I am of the view that after consideration of all the factors

relevant to this appeal that it is not disproportionate for the appellant to be removed from this country because the appellant's wife visits Nigeria on a regular basis and she has retained her links in Nigeria this in combination with the length of time that she resided in Nigeria prior to arriving in this country I am of the view that she would be able to adapt if she decided to return with her husband.

33. I have referred myself to the decision of **ZT 2018 EWCA Civ 1109** and I do not find that the refusal of leave to the appellant would result in unjustifiably harsh consequences he would be separated from his wife but she has the option of visiting him or joining him there permanently. I note the skeleton and oral arguments of the appellant's representative regarding the fact that the appellant and his wife at their age would find it difficult to adjust to life in Nigeria but the appellant's immigration status was precarious when they started the relationship and he could have taken steps much earlier to legalise his position. The appellant and his wife do not have children the appellant claims that he has relatives in this country but none of them gave oral evidence apart from the letters of support in pages 162-4".

4. The judge concluded that the respondent's decision was proportionate in all the circumstances and dismissed the appeal.

5. There was an application for permission to appeal and the First-tier Tribunal granted permission on 21 September 2018 as the judge had not considered an issue raised by the representative who had referred to **Chikwamba [2008] UKHL 40**.

6. A response was filed on 5 November 2018 and it was submitted that reference to **Chikwamba** was not "necessarily relevant or material". The Rules and Appendix FM showed there needed to be very significant obstacles to the couple conducting their family life outside the United Kingdom. The judge had fully considered the links both the appellant and his wife had to Nigeria and it was open to the judge to find that they had maintained close links.

7. Counsel at the hearing before me relied on his skeleton argument and referred to **Agyarko [2017] UKSC 11** where the court had made it clear that cases could succeed outside the Rules even though there were no obstacles to relocation. Counsel referred to paragraph 57 where he emphasised the last sentence (part of which was missing from the skeleton argument inadvertently):

> "The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In

> general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".

Counsel also referred to paragraph 51 in **Agyarko** where he highlighted the following words:

> "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 court notes that the point is illustrated by the decision in **Chikwamba**. Having referred to what was said in **Hesham Ali [2016] UKSC 60** Counsel referred to paragraph 44 of **Chikwamba**, again helpfully highlighting the following words:

> "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".

8. Counsel pointed out in the skeleton argument that both the English language requirement and the financial requirement were satisfied in the case and there were no concerns about suitability and accordingly the appeal should have been allowed. At the very least, the failure to consider the arguments was a material error of law.

9. At the hearing before me Counsel referred to the history of the matter where there had been judicial review proceedings and permission had been granted on the basis that the Secretary of State had not considered **Chikwamba** arguments. The matter had been reconsidered resulting in the November 2017 decision.

10. It was submitted that the First-tier Judge had not considered the issues although they had been raised before him. The judge had found there were no insurmountable obstacles which was accepted. Reference was made to paragraph 51 of **Agyarko**. It was conceded that this was not a case involving children. There were no suitability reasons for refusing the application. It was submitted the level of disruption facing the appellant's wife who worked for the NHS should be factored into account.

11. Ms Pal submitted that the First-tier Judge had taken into account the relevant factors. He had noted that the couple had knowingly entered into the relationship while the appellant was not lawfully in the United Kingdom. The appellant's status was precarious and there were public interest issues. The judge had considered the appellant's wife's citizenship and circumstances in paragraph 32 of the decision. He was entitled to have regard to the public interest in the balancing exercise and

to find that there would be no breach of Article 8 involved in requiring the appellant to return to Nigeria. This was not a case in which children were involved. It was claimed that there were relatives in the country but none had given oral evidence.

12. In reply, Counsel argued that the weight given to the public interest should be reduced given what was said in **Hesham Ali** at paragraph 34.

13. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I can of course only interfere with the judge's decision if it was flawed by an error of law.

14. Counsel referred to paragraph 57 of **Agyarko** and the last sentence of that paragraph is not without relevance in this case – "In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control". Furthermore, in paragraph 51 which refers to **Chikwamba** the bar is set quite high. There it is said – "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" (emphasis added). Although the judge made no express reference to **Chikwamba** he was referred to **Agyarko** and referred himself in paragraph 33 to **TZ (Pakistan)** where the case law including the **Chikwamba** point is addressed particularly in the context of precarious status. As the judge points out the appellant's immigration status was precarious when the relationship was started and "he could have taken steps much earlier to legalise his position". He also noted that the appellant and his wife do not have children – all this is indicative of the fact that the judge was alive to the **Chikwamba** issue.

15. I am not satisfied that the failure to make express reference to **Chikwamba** was a material error of law in the circumstances of this case or that the judge would or might have come to a different decision in the light of the principles in **Chikwamba**.

16. For the reasons I have given this appeal is dismissed and the decision of the First-tier Judge stands.

Notice of Decision

Appeal dismissed.

Anonymity Direction

The First-tier Judge made no anonymity direction and I make none.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 26 November 2018

G Warr, Judge of the Upper Tribunal