Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10446/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2018 and 4 April 2019	**On 15 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NKI
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant:	Mr S Whitwell, Home Office Presenting Officer (4 December 2018)
	Ms L Kenny, Home Office Presenting Officer (4 April 2019)
For the Respondent:	Mr J Siriwardena, counsel (4 December 2018)
	Mr J Siri, counsel (4 April 2019)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the applicant's appeal on human rights grounds outside the Rules against the decision of 13 September 2017 refusing him leave to remain on the grounds of his family and private life. In this decision I will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background.

2. The appellant is a citizen of Nigeria born on 6 May 1968. He married his former wife in Nigeria in 2001 and their first child was born in 2002. He came to the UK on 7 February 2006 with entry clearance a spouse and his leave was extended on two further occasions until 11 March 2010. However, by that stage difficulties had arisen in the marriage and the appellant had returned to Nigeria for some seven months while he and his wife's family attempted to resolve their problems. He sold his properties in Nigeria and made the funds available to his wife. In May 2009 he returned to the UK and initially there were no issues but subsequently arguments about money started again. In 2011 on return from work he found that the locks of the family home had been changed and he had been locked out. He lived on his own until 2013 when he met his current partner. They moved in together in 2014 and they intend to marry.

3. The appellant applied for further leave to remain in 2013 but his application was refused as he did not have any documentary evidence in a court order of his contact with his children. He then applied for a contact order, but his wife said that, unless he withdrew the application, she would not allow him to see the children and, following a hearing in the Family Court, the judge only allowed indirect access by post. The appellant had been granted discretionary leave to remain until 5 May 2013 but a subsequent application for leave was refused on 25 June 2013. That decision was later reconsidered and he was granted leave from 16 May 2016 until 31 August 2016. The application, the subject of this appeal, was made on 26 August 2016.

4. The respondent was not satisfied that the appellant could meet the requirements of the Rules or, having taken into account under para GEN.3.3. of Appendix FM the best interests of his children, that there were any exceptional circumstances within para GEN.3.2. which would result in unjustifiably harsh consequences for him or any relevant child.

The Hearing Before the First-tier Tribunal.

5. The judge found that the appellant could not meet the requirements for leave to remain as a parent, as he did not have sole responsibility for his children; they did not live with him and he did not have direct access to them either as agreed with their mother or by court order. She went on to consider the application on private life grounds under para 276ADE of the Rules but found that the appellant would not face very significant obstacles to integrating into life in Nigeria as he could find employment, he had family members there as did his present partner, whose father and four brothers lived in Nigeria and she was in contact with them. The family home was not currently occupied and there was no reason why the appellant would be unable to reside there if he returned.

6. She went on to consider the provisions of para GEN.3.2., finding that there were no exceptional circumstances to justify a grant of leave within that provision. A court order was extant in which a Family Court judge had found that it was in the best interests of the appellant's children that he did not have direct contact with them. It would not be an unjustifiably harsh consequence for him to be removed from the UK as he could continue with indirect contact. His current partner was a Nigerian national who had obtained UK citizenship in 2016 but she retained strong family links with Nigeria and could find employment there, albeit at a lower salary.

7. The judge then went on to consider the application outside the Rules. She said that there was a gap in the Rules, in that she must consider the likelihood of the appellant being granted leave to enter from outside the UK as a partner applying the guidance in R (on the application of Chen) v Secretary of State (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 189. She found that family life was engaged, removing the appellant to Nigeria would be an interference of sufficient gravity to engage article 8 and the decision was made for a legitimate aim. She went on to consider whether the interference would be proportionate to that legitimate public aim. She found that the appellant had provided evidence that he would be granted leave to enter as a partner on an application from Nigeria now and then said at [63]:

> "Weight must be given to the public interest in maintaining effective immigration controls. Weight can be given to the family life that the appellant has established in the UK, as the appellant was in the UK lawfully. The appellant would meet the requirements for leave to enter as a partner, now. For these reasons I find that the decision is disproportionate to the aim to maintain effective immigration controls and is in breach of the appellant's right to family life."

8. Accordingly, the appeal was allowed on human rights grounds.

The Grounds of Appeal and Submissions.

9. In the grounds of appeal, it is argued that the provisions of GEN.3.2. had been introduced into the Rules in August 2017 in response to the Supreme Court judgment in Agyarko v Secretary of State [2017] UKSC 11 and this amendment essentially made Appendix FM a complete code. It had brought within the Rules the test approved by the Supreme Court for deciding when an appellant who could not meet the substantive requirements of Appendix FM should, nevertheless, be allowed to remain because his removal would be a disproportionate breach of his article 8 rights.

10. The judge had erred, so the grounds argue, by undertaking a freewheeling article 8 proportionality exercise and, whilst the relevance of Chikwamba v Secretary of State [2008] UKHL 40 was somewhat hard to determine, given the developments in the Rules, legislation and case law, in the absence of a finding that a brief separation while entry clearance was sought was an unjustifiably harsh consequence, the judge was not entitled to find that there would be a disproportionate interference with the

article 8 rights of the appellant and his partner. In any event, the judge was required to consider the application of the substantive Rules to the new relationship and this she had failed to do.

11. Permission to appeal was granted by the First-tier Tribunal on the basis that the conclusion on disproportionality pivoted on the finding at [63] that the appellant had established that he would be granted entry clearance as a partner were he to make an out of country application, but it was arguable that in the light of the previous finding of no unjustifiable harshness and the developments in the law since Chikwamba that the judge's conclusion was in error.

12. In his submissions Mr Whitwell referred to the judgment of the Court of Appeal in R (on the application of Kaur) v Secretary of State [2018] EWCA Civ 1423. He submitted that Chikwamba had dealt with the situation within the Asylum Policy Instruction and was a case where there was a procedural requirement under the Rules requiring a person to make an application for entry clearance from outside the UK. He referred to [43] of Kaur and the fact that the facts in Chikwamba were striking. At [45] the Court had said that the Chikwamba principle would require a fact specific assessment in each case and would only apply in a very clear case and, even then, would not necessarily result in a grant of leave to remain.

13. He referred to [39] of Chen which held that if it was shown by an individual that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of entry clearance was reduced and that, in cases involving children where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance was obtained, it would be easier to show that the balance on proportionality fell in favour of the claimant than in cases not involving children but where removal interfered with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was precarious.

14. Mr Whitwell submitted that there had been no finding by the judge on whether the appellant's partner would remain in the UK while an application was made. The precariousness of the appellant's leave to remain had not been taken into account and the judge had not made any adequate findings to support her conclusion that the appellant could now meet the requirements of the Rules within Appendix FM.

15. Mr Siriwardena submitted that the judge had not erred in law. The appellant's partner was a senior staff nurse in a mental health ward and the appellant was a carer in an old people's home. There was no evidence how long an application for entry clearance would take and the position now was that the appellant had received his decree nisi and the situation had changed so far as contact was concerned. He argued that the judge had carried out the balancing exercise properly and had been entitled to find in the appellant's favour. It would be unduly harsh, so he submitted,

for the appellant to be required to return to Nigeria to make an application. The Rules did not need to be slavishly followed and the appellant and his partner had entered into their relationship in good faith.

Assessment of whether the First-tier Tribunal Erred in Law.

16. I must consider whether the judge erred in law such that the decision should be set aside. I am satisfied that the judge has erred in the following ways. Having found that the appellant could not meet the requirements of the Rules and in particular that there were no exceptional circumstances under GEN.3.2., having taken account of the best interests of the children in GEN.3.3., the judge said that there was a gap in the Rules and she must consider the likelihood of the appellant being granted leave to enter from outside the UK as a partner. She then carried out what was in effect a free ranging article 8 assessment without following the guidance of the Supreme Court in Agyarko at [54] – [60] that there needed to be compelling circumstances for a human rights claim to succeed outside the Rules. The assessment of the impact of Chikwamba was not considered in that context nor in the light of the finding that there would not be unjustifiably harsh consequences for the appellant within GEN.3.2.

17. I am also satisfied that the judge overstated the significance of Chikwamba, an appeal decided in 2008 prior to the extensive amendments to the Rules in 2012 and subsequently. The Upper Tribunal said in Hayat v the Secretary of State [2011] UKUT 444 that the significance of Chikwamba was to make plain that where the only matter weighing on the respondent's side of the balance was the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective would usually be outweighed by factors resting on the appellant's side of the balance. But in Kaur, the Court of Appeal held that the judgment in Chikwamba did not justify inclusion of the word "usually" in that approach. In this context the Court referred to the passage of Lord Reed in Agyarko referring to Chikwamba where he had noted that the reference was to an applicant who was "certain to be granted leave to enter" and that in such a case there might be no public interest in removing the applicant. The Court held that the Chikwamba principle would require a fact specific assessment in each case and would only apply in a very clear case and would not necessarily result in a grant of leave to remain.

18. Further, the judge did not explain in her decision how it was that she was satisfied that the appellant would be granted leave to enter as a partner. No adequate reasons are given for this conclusion. This is, therefore, not a case where the only factor weighing in the public interest is the need to make an application from abroad. The judge referred to s.117B of the 2002 Act, but the fact remains that family life with his partner was established when his leave in the UK was precarious as he did not have indefinite leave to remain.

19. For these reasons I am satisfied that the errors of law by the judge are such that the decision should be set aside and, in the light of the issues raised, should be remade in

the Upper Tribunal, rather than being remitted to the First-tier Tribunal. I made further directions to enable the appellant to update the position relating to his family life.

Further Evidence.

20. At the resumed hearing a further bundle of documents indexed and paginated A1-C66 was filed on behalf of the appellant. He gave further oral evidence in accordance with his witness statement dated 27 March 2019 (A3-6). He explained that his partner, whose witness statement is at A7-8, was not able to attend the hearing as she had to attend mandatory training as a nurse. He confirmed that he understood that the threshold income for a grant of entry clearance as a spouse was about £18,500 and that his partner earned in excess of that. He had no criminal convictions. He and his partner been living together for five years and his divorce from his previous wife had now come through. He understood that the cost of making a visa application in Nigeria would be about £1050 and he thought the application would take about three months, but a friend had said that it could take longer.

21. He accepted that his immigration status was precarious. He explained that he had taken out a number of loans to obtain qualifications for his present employment as a support worker and to buy a car needed for that work. He had to visit elderly people and this would not be possible by public transport. If he had to stay in Nigeria, his loan payments would pile up. He could get a job there and would earn about 80,000 naira, about £200, but this was not enough to finance his loans. By this May he would have been in the UK for 10 years. He explained that he belonged to a health care professional body and needed to keep up with training.

22. In cross-examination he said that he could not have got his present job without his own transport. He worked 40 hours in a care home and did agency work of up to 20 hours a week. He confirmed that he had taken out his loans so that he could obtain and carry out his job. He was paying a total of about £800 a month to pay them off. His household bills were paid by his partner and they shared the cost of their present accommodation. He was asked whether he would be able to get work on return to the UK and he thought that would depend on how long he was away. He could not continue to pay off the loans in Nigeria whilst waiting for his application for entry clearance to be considered. If his application for entry clearance was not successful, he said it would cause his partner a lot of distress and he did not know what she would do as she believed that he would be able to come back.

Further submissions.

23. Ms Kenny submitted that it will be entirely reasonable to expect the appellant to return to Nigeria to make an application for entry clearance. She relied on the judgment of the Court of Appeal in Kaur, submitting that this was not a case where the appellant was certain to be granted leave to enter. She argued that he had acted irresponsibly by taking out loans when he knew that his immigration status was

precarious. There were no exceptional or compelling circumstances justifying a grant of leave outside the Rules.

24. Mr Siri, referring to Kaur, submitted that each appeal had to be looked at on a case-by-case basis. The appellant and his partner would be able to meet the requirements of the Rules and he had no criminal convictions or civil judgments against him. He also had only a matter of weeks to go before completing 10 years residence in the UK. Taking the length of his residence into account with the fact that he had a very good chance of obtaining a visa, removal would the disproportionate. The fact that the appellant's status was precarious had to be balanced with the fact that he was in employment valuable to the community as was his partner. There would be an unnecessary and disproportionate disruption to both their lives, so he argued, if the appellant had to return to Nigeria even for a short period to make an application for entry clearance.

Assessment of the issues.

25. It is not in dispute that the appellant is unable to meet the requirements of the Rules for entry clearance either as a parent or a partner. As set out in the decision letter he does not meet the eligibility requirements of E-LTRPT.2.2.-2.4. as he was unable to show that he had direct access to his children by his previous marriage. He was granted discretionary leave which enabled him to pursue a claim for contact but following hearings in the Family Court the appellant was only granted indirect contact. In his recent witness statement at [13] the appellant refers to a hearing when the judge told him that it be a waste of his time and money to try and obtain contact with his children as his former wife had done everything possible to avoid him having contact. This is clearly a sad and unhappy situation but, nonetheless, the appellant is unable to meet the requirements of the Rules in relation to his contact with his children.

26. The First-tier Tribunal judge found that the provisions of GEN 3.2 were not met and that there were no exceptional circumstances relating to the best interests of the children requiring further consideration under the Rules and further, that there would not be very significant obstacles to the appellant integrating into life in Nigeria. This is confirmed by the appellant's acceptance that he has accommodation and could find work in Nigeria. For the sake of completeness, it must also follow from the findings of the First-tier Tribunal and from the further evidence that this is not a case where there would be insurmountable obstacles to family life with his partner continuing outside the UK within para EX.1.

27. It is not in dispute that removing the appellant would interfere with his family life to such an extent as to engage article 8, the decision is in accordance with the law and is for the legitimate aim maintaining effective immigration control as part of the legitimate aim of protecting the economic well-being of the UK. The issue, therefore, is whether the interference would be proportionate to a legitimate public aim.

28. I must approach this assessment in accordance with the guidance given by the Supreme Court in cases such as Agyarko (see [16] above) which sets out the importance of taking into account in assessing the public interest the policy of the Secretary of State as set out in the Rules. The Court held that there needed to be compelling circumstances for a claim on human rights grounds to succeed outside the Rules.

29. A factor of importance when assessing family life is whether it was formed at a time when the appellant had only precarious leave to remain. In Rhuppiah v Secretary of State [2018] UKSC 2018 the Supreme Court confirmed that a person who was not a UK citizen but present in the UK with leave to reside here other than indefinitely had a precarious immigration status, which had to be taken into account when assessing proportionality. In Agyarko at [49], the Court referred to the judgment of the ECtHR in Jeunesse v Netherlands [2015] 60 ECRR 17 and in particular to the statement that in cases of precarious family life it was likely to be only in exceptional circumstances that removal would constitute a breach of article 8.

30. The appellant's marriage finally broke down in 2011 after previous difficulties which had led him to return to Nigeria in 2008, returning to the UK in 2009. He applied for further leave to remain in 2013 and subsequent applications were successful to a limited extent in that he was granted discretionary leave until 5 May 2013 and again from 16 May 2016 until 31 August 2016 giving him the opportunity of pursuing contact proceedings in relation to his three children in the UK. He moved in with his partner in 2014 and it is clearly their wish that should continue to live in the UK. His partner is a UK citizen but has strong links to Nigeria.

31. I must take into account the factors set out in s.117B of the 2002 Act. The maintenance of effective immigration controls is in the public interest: s.117B(1). The appellant can speak English and he is not a burden on taxpayers as he is working. The provisions of s. 117B(4) and (5) do not apply but his family life was formed when his status was precarious. He is unable to meet the requirements of s.117B(6).

32. It is submitted on behalf of the appellant that if he had to return to Nigeria, he would have difficulty maintaining his loan repayments and he and his partner would be in difficulty in meeting their current outgoings. However, no evidence has been produced to show that any attempt has been made to obtain any deferment of the repayments or to obtain a short-term loan to cover repayments whilst the appellant makes an application from abroad. In any event, these loans were obtained by the appellant at a time when he knew his leave was precarious.

33. It is further argued that it would take three months, perhaps even longer, to obtain entry clearance and there would be the additional costs of the application but there is no reason to believe that there would be any undue delay in deciding his application and the costs of the application have to be met by all who apply.

34. It is further argued that in May 2019 he will have been residing in the UK for 10 years. Whilst I take into account the length of his residence, a possible future claim which has not yet crystallised is a matter of relatively little weight.

35. I must also take into account the judgment of the Court of Appeal in Kaur that in cases where it is asserted that an appellant can now meet the requirements of the Rules, it must be shown that the appellant is "certain to be granted leave to enter" and that in such a case there might be no public interest in removing the appellant.

36. The appellant does not satisfy me that he is certain to be granted entry clearance. His claim that he meets the financial requirements of the Rules is substantially based on his assertions but neither he nor his partner have provided in the documents produced for this appeal the specified evidence required to be submitted in support of an application for entry clearance as set out in the provisions of appendix FM-SE, para 2 in relation to salaried employment. The public interest in the maintenance of immigration controls includes requiring applications for entry clearance to be made and assessed in accordance with the specific requirements of the Rules including the evidential provisions.

37. I am not satisfied that these various factors individually or cumulatively approach the kind of compelling or exceptional circumstances which could justify a finding that requiring the appellant to comply with the requirements of the Rules would in his circumstances be disproportionate.

38. Accordingly, I am not satisfied that removing the appellant would be disproportionate to a legitimate aim or that it is unreasonable to expect him to make a claim in accordance with the Rules.

Decision.

39. The First-tier Tribunal erred in law and the decision has been set aside. I remake the decision by dismissing the appeal on human rights grounds. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter Dated: 11 April 2019

Deputy Upper Tribunal Judge Latter