Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22207/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th November 2019	**On 15th November 2019**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

OLUSEGUN AREMU BABALOLA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Bustani, Counsel instructed by Universe Solicitors
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Nigeria. Most recently, he arrived in the UK with leave to enter as a visitor valid until 27th September 2013. He remained in the UK unlawfully when the visit visa expired. On 28th September 2017, the respondent

received an application for leave to remain on family and private life grounds. The applicant relied upon his relationship with Ganiat [F]. He claimed that the relationship began in April 2014 and that he had started living with his partner on 30th August 2014, at an address shared by the appellant's partner and her two adult daughters. That application was refused by the respondent for the reasons set out in a decision dated 18th October 2018.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Daldry for the reasons set out in a decision promulgated on 20th June 2019. It is that decision that is the subject of the appeal before me. Permission to appeal was granted by First-tier Tribunal Judge Hollingworth on 2nd September 2019.

The decision of First-tier Tribunal Judge Daldry

3. The judge refers to the appellant's immigration history at paragraphs [3] and [4] of her decision. The background to the appellant's claim for leave to remain in the UK is set out at paragraphs [5] to [10] of the decision. The judge refers to the reasons provided by the respondent for refusing the application, at paragraphs [13] to [16] of her decision. The Judge's findings and conclusions are set out at paragraphs [20] to [45] of the decision.

4. At the hearing of the appeal, the judge heard evidence from the appellant and his partner. The judge found the appellant and his partner to be credible witnesses with regard to their feelings for one another, and their commitment to their relationship. She found that the applicant and his partner are in a genuine and subsisting relationship and that they intend to live together. The judge carefully considered the evidence before her regarding the date upon which the appellant and his partner began to live together. She noted that there was evidence in the form of a council tax statement that established that the applicant and his partner had been living together since 1st September 2016. The judge also noted that there was evidence regarding an 'electricity account' that established that they were living together as at November 2016. At paragraph [30] of her decision, the judge found that whilst the appellant and his partner may well have been in a relationship prior to August 2016, it is more likely than not that it was in August 2016, when they started living together. The judge noted that the documentary

evidence before the Tribunal supports that conclusion, as does the fact that their marriage was blessed on 18th August 2016. At paragraph [31], the judge referred to the evidence set out in a statement that was before the Tribunal from the daughter of the appellant's partner. Although she did not attend to give evidence, her evidence was relied upon by the appellant. In her statement, she stated that the appellant used to visit the family regularly "*but in August 2016 he started living with us as a family unit…".* The judge considered the explanation provided by the appellant that the author of that statement had made a mistake, and had intended to say that the appellant had lived with his partner since August 2014. The judge rejected that explanation. The judge stated, at [31]:

> "…If it had been a simple typographical error, it would have been easy enough for those representing the appellant to have had it corrected by Alice prior to the hearing. In my finding, the inclusion of the very specific date set out in Alice's statement suggests to me that it is more likely than not, that it was then that the appellant started living with Ms Fadario and not at an earlier time."

5. Having found that the appellant has not established that he had lived with his partner for at least two years prior to the date of the application, the judge concluded that the appellant does not satisfy the relevant relationship requirements set out in Appendix FM. That is because section GEN.1.2. defines a 'partner' for the purposes of Appendix FM as, *inter alia*, a person who has been living together with the applicant in a relationship akin to a marriage or a civil partnership for at least two years prior to the date of the application.

6. The judge was satisfied that the relevant financial requirements are met by the appellant. At paragraph [27] of her decision, the judge refers to the earnings of the appellant's partner. The judge accepted her evidence with regard to her employment history as being genuine. At paragraph [35] of the decision, the judge stated:

> "It is of note that given that the appellant and Ms [F] have continued to live together, it is likely that the appellant would be able to establish the entry clearance requirements for an application based on his relationship with Ms [F]. They are in a genuine and subsisting relationship as of the date of this hearing and in my finding they do intend to live together permanently. There are no reasons to question their suitability and Ms [F] is a British citizen. Both their previous relationships have permanently broken down and I have seen the

> divorce certificate of Ms [F] in this respect. The financial requirements are clearly met. Ms [F]'s income greatly exceeds the £18,600 required."

7. At paragraph [36], the judge refers to the evidence of the appellant's partner that she would not leave the UK to go to Nigeria with the appellant. The judge accepted that evidence but found that the appellant could remain in contact with his partner for a period of time while he prepared an out of country application to join her. At paragraph [37], the judge found that there are no exceptional provisions with regard to family life. She noted that the appellant's partner's two daughters are adults. At paragraph [40], the judge stated:

> "The case before me was not analogous to the **Chikwamba** circumstances. In **Chikwamba** it was found that it would be a violation of Article 8 if the applicant in that case were removed from the United Kingdom and forced to make an out of country application for leave to enter which would clearly be successful and in circumstances where the interference with family life could not be said to serve any good purpose. However, in the case before me, I find that the family life such that it does not involve young children but rather two adult children both of whom are primarily cared for by their British citizen mother. There is no suggestion that Ms [F] would go to Nigeria with the appellant and although it is in my view likely that an out of country application for leave to enter would be treated favourably, there is no guarantee. With regard to **Beouku Betts** I find that the family life in Mr Babalola's case is not comparable with that as set out in **Beouku Betts** and he cannot rely on that case to assist his appeal. I do not find that the impact on the family would be significant if the appellant were to be required to make an out of country application. The children are adults and have not shown any level of dependency on the appellant. It is their mother who supports them and her own evidence was that she would not leave the UK to follow the appellant."2

8. The judge went on to consider the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. She noted in particular that the appellant formed his relationship with his partner at a time when he was in the United Kingdom unlawfully, and she is required to attach little weight to the relationship in that respect. She noted that both the appellant and his partner would have known that he was in the UK unlawfully when they established their relationship. At paragraph [45], the judge concluded as follows:

> "Weighing it up and looking at it in the round, I conclude that the decision was proportionate. The appellant does not meet the rules. I understand that he would prefer to remain in the UK and that Ms [F] would also prefer that. However, the public interest in this case outweighs the other factors and I find for the reasons set out above that the appeal should be dismissed."

The appeal before me

9. The appellant claims that the evidence before the Tribunal from the appellant and his partner was that they had started living together in August 2014. It is said that the finding made by the Judge that they started living together in August 2016, is a finding based largely, upon the lack of documentary evidence showing the appellant living at the address prior to 1st September 2016. The appellant claims that although the judge was right to note that the evidence relating to the period prior to September 2016 was lacking, the judge failed to have proper regard to the oral evidence of the appellant and his partner, whom, the judge found to be credible witnesses in other respects. Ms Bustani submits there is no need for documentary evidence to support the claim that they have lived together since 2014, and the judge should have attached more weight to the oral evidence of the appellant and his partner.

10. The appellant also claims that having found that the relationship requirement under Appendix FM of the immigration rules was not met, the judge failed to consider whether the appellant can benefit from the exception to certain eligibility requirements for leave to remain as a partner, set out in section EX.1 of Appendix FM of the immigration rules. Ms Bustani submits that the judge accepted that the appellant has a genuine and subsisting relationship with his partner who is a British citizen. The judge should therefore have gone on to consider whether there are insurmountable obstacles to family life with the appellant's partner continuing outside the UK. Ms Bustani submits the judge did not consider this issue at all. She submits the evidence before the Tribunal and accepted by the judge, was that the appellant's partner would not leave the United Kingdom to go to Nigeria. The evidence of the appellant's partner is that she remains responsible for her younger child who is currently undergoing her own nursing training in London. The appellant's partner therefore has responsibilities in the United Kingdom that prevent her living with the appellant in Nigeria.

11. Finally, the appellant claims that the judge found, at [35], that it is likely that the appellant would be able to satisfy the entry clearance requirements for an application based on his relationship with Ms [F]. Ms Bustani submits that the requirements for entry clearance as a partner are met, and although the judge

refers to the decision in Chikwamba, the judge has erroneously failed to properly apply the principle. She submits the Supreme Court, in Agyarko -v- SSHD [2017] UKSC 11, held that whether an applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, if the applicant is certain to be granted leave to enter if an application were made from outside the UK, then there might be no public interest in his or her removal. She submits the judge erroneously distinguishes the facts here, on the basis that the family life here does not involve young children, but two adult children.

Discussion

12. I reject the first ground of appeal. In reaching her finding that the appellant and his partner started living together in August 2016, the judge carefully considered all the evidence that was before the Tribunal. The judge found, at [20], that the appellant and his partner are credible witnesses with regard to their feelings for one another and their commitment to their relationship. It does not follow that the judge was bound to find that they are credible as to the date upon which they began living together. In reaching her decision, the judge carefully considered all the evidence before the Tribunal. In reaching her decision, the judge considered the documentary evidence that pointed to the appellant and his partner living at the same address from September 2016, the fact that the relationship was blessed according to Islamic custom in August 2016, and the evidence set out in the witness statement of Alice [F]. Her evidence was that the appellant used to visit the family regularly, but he started living with them in August 2016.

13. The Judge here, was not satisfied that the appellant and his partner had been living together in a relationship akin to a marriage for at least two years prior to the date of application. That was in my judgement, a conclusion that was open to the FtT judge on the evidence before the FtT. The finding reached by the judge was neither irrational nor unreasonable in the *Wednesbury* sense, or a finding that was wholly unsupported by the evidence.

14. Having found that the requirements for limited leave to remain as a partner set out in Appendix FM cannot be met, the appellant had to rely upon Section EX.1.(b) and to establish that he has a genuine and subsisting relationship with a

partner, and there are insurmountable obstacles to family life with that partner continuing outside the UK. The judge notes at paragraph [39], that she has considered the exception set out in EX.1(b) and EX.2 of Appendix FM. The appellant would have to establish that there would be very significant difficulties faced by the applicant and his partner in continuing their family life together outside the UK, which could not be overcome, or would entail very serious hardship for the appellant or his partner. The judge referred, at [36], to the evidence of the appellant's partner and accepted that she would not leave the United Kingdom.

15. Ms Bustani referred me to the evidence set out in the witness statement of the appellant's partner dated 29th April 2019, and paragraphs [8], [11] and [15] in particular. The appellant's partner claims that her temporary or permanent relocation to Nigeria with the appellant would affect her career and her relationship with her daughters. Her evidence is that her daughters have made it known to her that they would not relocate to Nigeria with her, and that they are still dependent upon her for their accommodation. Her evidence is that her partner has no job to return to in Nigeria, to enable him to accommodate and care for them. They have no assets in Nigeria, and her evidence is that it will be difficult to adapt. Taking that evidence at its highest, although living in Nigeria together may cause a degree of hardship for the appellant's partner, there is no evidence that there are insurmountable obstacles preventing the appellant and his partner from continuing their relationship in Nigeria.

16. In R v Immigration Appeal Tribunal, ex parte Khan [1983] QB 790 (*at page 794*) Lord Lane explained that the issues which the Tribunal is deciding and the basis on which the Tribunal reaches its decision may be set out directly or by inference. He noted; "*The reason is this. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the Appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not.*".

17. Having carefully considered the decision of the FtT judge and the evidence that was before the Tribunal for myself, I accept that the judge did, as she expressly states at [39], consider whether the appellant can benefit from the exception set out in section EX.1.(b) of Appendix FM, but even if she did not, that omission is in my judgment, immaterial. The focus of the evidence relied upon by the appellant was the connections that the appellant's partner has to the UK and responsibilities that the appellant's partner has towards her two adult daughters. There was little evidence of substance to establish that there would be very significant difficulties faced by the appellant or his partner in continuing their family life together outside the UK, that could not be overcome or would entail very serious hardship for the appellant and his partner. The fact that the appellant's partner may not wish to leave the United Kingdom, is entirely a matter of choice. Although living in Nigeria together may cause a degree of hardship for the appellant's partner, there was no evidence before the Tribunal of insurmountable obstacles preventing the appellant and his partner from continuing their relationship in Nigeria, either permanently, or temporarily whilst an application for entry clearance is made.

18. Finally, Ms Bustani submits that the appellant can meet the requirements of the immigration rules, if an application for entry clearance were to be made by the appellant. Relying upon paragraph [51] of the judgement of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11, she submits that although the appellant has been residing in the UK unlawfully, the public interest does not require the removal of the appellant from the UK, so that an application for entry clearance can be made by him.

19. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules.

20. In in Hayat -v- SSHD [2012] EWCA Civ 1054, the Court of Appeal held that the effect of Chikwamba is that (a) where an applicant lacked lawful entry clearance, the dismissal of his Article 8 claim on the procedural ground that he should, as a matter of policy, have made the application from his own state, might constitute a disruption of family or private life sufficient to engage Article 8; (b) where Article 8 was engaged, it was a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so; (c) whether it was sensible to enforce that policy was fact-sensitive; (d) where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision-maker should determine the Article 8 claim on its substantive merits, notwithstanding that the applicant had no lawful entry clearance; (e) it would be a very rare case where it was appropriate for the Court of Appeal, having concluded that a lower tribunal had disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself; (f) nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues; (g) if the secretary of state had no sensible reason for requiring the application to be made from the home state, her failure to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise.

21. More recently in Agyarko -v- SSHD [2017] UKSC 11 Lord Reed said:

> "50. … As the instruction makes clear, "precariousness" is not a preliminary hurdle to be overcome. Rather, the fact that family life has been established by an applicant in the full knowledge that his stay in the UK was unlawful or precarious affects the weight to be attached to it in the balancing exercise.
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> 51. 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*."

22. On the findings made by the judge, the appellant is unable to satisfy all the requirements for leave to remain as a partner as set out in Appendix FM of the

immigration rules. The applicant had remained in the UK unlawfully and the decision that he should, as a matter of policy, make an application for entry clearance from Nigeria constituted a disruption of family or private life sufficient to engage Article 8.

23. The issue in this appeal, as is often the case, was whether the interference with the right to family life is proportionate to the legitimate public end sought to be achieved. Although the decision of the House of Lords in Chikwamba v SSHD and subsequent decisions of the Court of Appeal and Supreme Court establish that where there is evidence that an application for entry clearance from abroad is likely to succeed, then the weight to be accorded to the requirements of obtaining entry clearance from abroad is reduced, a fact sensitive consideration is required.

24. In reaching her decision, the judge had regard to section 117B Nationality, Immigration and Asylum Act 2002 that requires that in considering the public interest question, the Tribunal must (in particular) have regard to the considerations listed in section 117B. The judge considered the appellant's immigration history and acknowledged that little weight should be given to a relationship that was established by the appellant at a time when he was is in the United Kingdom unlawfully. There was no evidence before the Tribunal regarding the disruption that would be caused to the Article 8 rights of the appellant and his partner, in particular. Here, the judge concluded that there is a sensible reason for enforcing the policy, and found that the applicant's relationship with his partner that is relatively recent, could continue whilst the applicant made an out of country application from Nigeria. The judge determined the appellant's Article 8 claim on its own merits, and it was in my judgement open to the judge, looking at all the evidence in the round, to conclude that the refusal of leave to remain is proportionate in all the circumstances. It is necessary to guard against the temptation to characterise as an error of law what is in truth no more than a disagreement about the weight to be given to different factors, particularly where the judge who decided the appeal has had the advantage of hearing oral evidence and considering all the evidence in the round. The judge found that although an application for entry clearance is likely to be treated favorably, there is no guarantee. It was open to the judge to find that the impact on the family would not be significant if the appellant were to be required to make

an out of country application. The decision was in my judgement, a decision that was open to the FtT judge on the evidence before the FtT. The finding reached by the judge was neither irrational nor unreasonable in the *Wednesbury* sense, or a finding that was wholly unsupported by the evidence.

25. In my judgment, it was open to the judge to dismiss the appeal for the reasons given by her. It follows that the appeal before me, is dismissed.

Notice of Decision

26. The appeal against the decision of F*t*T Judge Daldry is dismissed.

Signed Date 13th November 2019

Upper Tribunal Judge Mandalia

FEE AWARD

I have dismissed the appeal and there can in the circumstances, be no fee award.

Signed Date 13th November 2019

Upper Tribunal Judge Mandalia