Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11073/2019_P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 16 September 2020

Decision & Reasons Promulgated
On 21 September 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between
Mr Bankole Ayodeji Osadiya
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

This is a decision on the papers without a hearing. Neither party made any submissions on the question whether it is appropriate for the Upper Tribunal to decide the Issues (as identified at para 5 below) without a hearing. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 6-18 below. The order made is set out at para 83 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by written submissions):
For the appellant: Ms A Delbourgo, of Counsel, instructed by A.Vincent Solicitors Ltd.
For the respondent: Mr T Lindsay, Senior Presenting Officer.

DECISION

1. The appellant, a national of Nigeria born on 17 June 1968, appeals against a decision of Judge of the First-tier Tribunal Rayner who, in a decision promulgated on 12 November 2019 following a hearing on 21 October 2019, dismissed his appeal on

human rights grounds (Article 8) against a decision of the respondent of 14 June 2019 to refuse his application of 24 April 2019 for leave to remain on human right grounds (Article 8) as the partner of his wife, Mrs. Mercy Omojowho, a British citizen (hereafter the "sponsor").

2. Permission to appeal was granted by Judge of the First-tier Tribunal Foudy in a decision signed on 1 May 2020 and sent to the parties on 10 June 2020.

3. On 23 June 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Lindsley dated 22 June 2020. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge Lindsley had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (a) and (b) set out at para 1 of her "*Note & Directions*", reproduced at my para 5(i)(a) and (b) below, without a hearing. Judge Lindsley gave the following directions:

   (i) Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the First-tier Tribunal ("FtT") should be set aside if error of law is found, no later than 14 days after the "*Note and Directions*" was sent to the parties; for any other party to file and serve submissions in response, no later than 21 days after the "*Note and Directions*" was sent to the parties; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days after the "*Note and Directions*" was sent to the parties.

   (ii) Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and (b) may submit reasons for that view no later than 21 days after the "*Note and Directions*" was sent to the parties.

4. In response to the "*Note and Directions*", the Upper Tribunal has received the following:

   (i) on the appellant's behalf, a document entitled: "*Appellant's skeleton argument"* dated 2 July 2020 by Ms Delbourgo, submitted by A. Vincent Solicitors Ltd, the appellant's representatives, by an email to the Upper Tribunal dated 2 July 2020 timed at 23:11 hours;

   (ii) on the respondent's behalf, a document entitled: *"Respondent's written submissions"* dated 13 July 2020 by Mr Lindsay, submitted under cover of an email to the Upper Tribunal dated 13 July 2020 timed at 18:42 hours; and

   (iii) on the appellant's behalf, the following submitted by an email dated 20 July 2020 from A. Vincent Solicitors Ltd to the Upper Tribunal timed at 18:30 hours:

      (a) The sponsor's undated statement (hereafter the "*sponsor's July 2020 statement*") at para 1 of which she says she disputes in its entirety the respondent's written submissions dated 13 July 2020.

(b) Copies of a Barclays bank statement for an account in the name of Mercy Venture Limited for the period from 23 May 2020 to 22 June 2020.

(c) A document said to show communications between the sponsor and her daughter, Precious, for the period from 19 March 2020 to 17 July 2020.

(d) Various photographs of a young lady (presumably Miss Precious), young children (presumably the sponsor's grandchildren) and a man holding a baby.

The issues

5. I have to decide the following issues (hereafter the "*Issues"*),

(i) whether it is appropriate to decide the following questions without a hearing:

(a) whether the decision of the Judge involved the making of an error on a point of law; and

(b) if yes, whether the Judge's decision should be set aside.

(ii) If yes, whether the decision on the applicant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

Whether it is appropriate to proceed without a hearing

6. Neither party has made any submissions on the question whether it is appropriate for the Upper Tribunal to decide the Issues.

7. I do not rely upon the mere fact that neither party has made any such submissions as a factor that justifies proceeding without a hearing. I have considered the circumstances for myself in order to reach a decision as to whether it is appropriate for the Upper Tribunal to proceed to decide the Issues without a hearing.

8. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes [2002] EWCA Civ 1104 to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge*"; Keene LJ at para 47 of Sengupta v Holmes concerning the impact that oral submissions may have on the decision-making process; paras 35 and 48 respectively of the judgments of Lord Bingham and of Lord Slynn in Smith v Parole Board [2005] UKHL 1; the dicta at para 17(3) of Wasif v SSHD [2016] EWCA Civ 82 concerning the power of oral argument; the dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done; and the dicta at para 8 of R (Siddiqui) v Lord Chancellor and others [2019] EWCA Civ 1040 to the effect that it is an "*undeniable fact that the oral hearing procedure lies at the heart of English civil procedure*", to mention just a few of the cases in which we have received guidance from judges in the higher courts concerning the importance of an oral hearing.

9. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.

10. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. This appeal concerns rights of appellant and his wife, the sponsor, under Article 8 of the ECHR, i.e. matters of *some* importance as are many decisions in the immigration field. There was also evidence before Judge Rayner that the sponsor has two grandchildren who are infants.

11. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.

12. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases.

13. Of course, it is impermissible, in my view, to proceed to decide a case without a hearing if that course of action would be unfair in the particular case. If it would be unfair to proceed to decide an appeal without a hearing, it would be unfair to do so even if there would be a lengthy delay in order to hold a hearing face-to-face or remotely or even if there is a consequent delay on other cases being heard. The need to be fair cannot be sacrificed.

14. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.

15. Taking a preliminary view at the initial stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that there was nothing complicated at all in the assessment of the Issues in the instant case. I kept the matter under review throughout my deliberations.

16. No issues arose regarding the Issues during the course of my deliberations that I would have asked the parties to address if there had been a hearing, whether a face-to-face hearing or a remote hearing.

17. At the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis, that it was appropriate to decide the Issues without a hearing.

18. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

Questions (a) and (b) - whether the Judge erred in law and whether her decision should be set aside

Background

19. The appellant last entered the United Kingdom on 8 May 2011 as a visitor with leave to remain until 21 January 2016.

20. On 5 February 2016, i.e. 15 days after his leave expired, he applied for further leave to remain which was refused on 6 May 2016. He appealed against that refusal. His appeal was dismissed by Judge of the First-tier Tribunal G Clarke in a decision promulgated on 19 July 2018 following a hearing on 8 June 2018.

21. The appellant's applications for leave to appeal against that decision were refused by the First-tier Tribunal on 15 August 2018 and by the Upper Tribunal on 14 November 2018.

22. The appellant then made his application for leave to remain of 24 April 2019, which the respondent refused in the decision dated 14 June 2019 which is the subject of this appeal.

23. At para 18 of his decision, Judge Rayner made certain findings which he said were uncontested and which set out further relevant background. Para 18 reads:

> "18. I incorporate the chronology and background above into my findings of fact. I make the following uncontested findings:
>
> (i) [The appellant] married in Nigeria on 17 June 2000, and was divorced in Nigeria on 10 February 2011: page 75 AB.
>
> (ii) [The sponsor] is a 57-year-old British citizen. She was married on 12 March 1988 to Mr Gabriel Ochuko Omojowho. There are four children of that marriage, all of whom are UK citizens and living in the United Kingdom. They are aged between 31 and 21 years of age. The marriage was dissolved on 25 April 2015.
>
> (iii) [The appellant] and [the sponsor] met in April 2014, started to live together in August 2014 and married on 9 January 2016. At all relevant times [the appellant] had limited leave to remain in the United Kingdom. That leave expired on 21 January 2016.
>
> (iv) The Home Office accepts that the relationship between [the appellant] and [the sponsor] is genuine and subsisting. I unhesitatingly endorse that assessment. The nature of the relationship is supported by objective evidence. Their witness statements reveal a genuine and subsisting commitment to each other.
>
> (v) At all material times [the sponsor] has worked as a nurse. The refusal letter acknowledges that [the sponsor] meets the financial eligibility requirements of Appendix FM to the Immigration Rules. It is apparent from the documents provided that she surpasses the £18,600 annual minimum income threshold by some margin.
>
> (vi) [The applicant's] previous human rights application for leave to remain was made on 5 February 2016, shortly after his leave to remain had expired on 21 January 2016.
>
> (vii) [The appellant] became appeal rights exhausted in November 2018, after his application for permission to appeal was refused by the Upper Tribunal. His current application was made on 24 April 2019, by which time he was an overstayer. He therefore does not satisfy the immigration status eligibility requirements of Appendix FM to the Immigration Rules.
>
> (viii) [The appellant] acknowledges that he cannot demonstrate that he has an English Language qualification. He was prepared to take a test but was unable to do so because the Home Office had retained his passport, which he needed as identification for the test centre. [The appellant] and his representatives are critical of

> the Home Office for this. However, it makes little practical difference to [the appellant]'s legal position, as he would have to satisfy EX. 1 to Appendix FM to the Immigration Rules in any event, as he did not satisfy the immigration status eligibility requirements."

24. As para 18(ii) of Judge Rayner's decision states, the sponsor has four children, i.e. a son named Neil (date of birth: 8 May 1988), a daughter named Amy (date of birth 14 February 1991), a son named Glen (date of birth 10 January 1994) and her daughter, Precious (date of birth 16 October 1998).

25. When the appellant made his application of 5 February 2016 for leave to remain, Miss Precious was aged 17 years. By the date of the hearing before Judge Clarke, she was over 19 years of age.

Judge Clarke's decision

26. Insofar as relevant to the grounds of appeal against the decision of Judge Rayner, Judge Clarke found, in summary, as follows:

    (i) The appellant was not the parent of a child under 18 and he could not therefore succeed under the parent route of Appendix FM (para 23 of Judge Clarke's decision).

    (ii) Para EX.1. of Appendix FM did not apply because Judge Clarke found that there were no insurmountable obstacles to family life continuing between the appellant and the sponsor in Nigeria. In this regard, Judge Clarke found, in summary as follows:

        (a) The sponsor *"… last saw her son Neil in the latter part of 2014 and her son Glen in 2016*" (para 30).

        (b) Judge Clarke did not find that there was anything exceptional about the relationship between the sponsor and Miss Precious beyond the normal emotional ties between adult relations; that the sponsor had some direct contact with Miss Precious but it was not frequent; that the face-to-face contact was once every couple of months; taken at its height, most of the contact was by telephone; and that the sponsor would be able to maintain contact with Miss Precious by telephone if she moved to Nigeria with the appellant and returned to the United Kingdom for visits with her daughter (para 31).

        (c) The appellant and the sponsor both had family in Nigeria. They could derive emotional and practical support from their family in Nigeria. The appellant's evidence that the sponsor supports four siblings in Nigeria suggests that she is close to them (para 33). Judge Clarke placed weight on the fact that the sponsor had Nigerian heritage and had returned to Nigeria on occasions, the most recent visit being in 2015 (para 34). The appellant and the sponsor were both of working age and had skills that were easily transferable. The appellant sold clothes. The sponsor had trained as a teacher in Nigeria and has worked as a nurse in the United Kingdom (para 35).

(iii) The appellant did not meet the requirements of para 276ADE(1) of the Immigration Rules. In relation to para 276ADE(1)(vi), the appellant would not experience very significant obstacles to his reintegration in Nigeria. Judge Clarke gave his reasons for this finding at paras 40-46 of his decision.

(iv) Judge Clarke then considered the appellant's Article 8 claim outside the Immigration Rules, taking into account, inter alia, his findings in relation to the appellant's family life and private life claims under the requirements of the Immigration Rules. He found that the decision was proportionate, giving his reasons at paras 48-68.

Judge Rayner's decision

27. It was accepted before Judge Rayner that the appellant could not satisfy the immigration requirements or the English language requirements of Appendix FM and therefore he could only qualify under Appendix FM if he can show that paragraph EX.1 applies (para 19 of Judge Rayner's decision). Accordingly, as Judge Clarke had before him, Judge Rayner considered whether there were very significant obstacles to family life continuing between the appellant and the sponsor in Nigeria.

28. Judge Rayner noted (at paras 22, 23 and 25) that, unlike the position in the appeal before Judge Clarke, neither the appellant nor the sponsor had in the appeal before him (Judge Rayner) relied upon the sponsor's relationship with any of her four children including Miss Precious, to assert that there were insurmountable obstacles to family life between the appellant and the sponsor continuing in Nigeria. The relevant parts of paras 22, 23 and 25 read:

> "22. Neither [the appellant] nor [the sponsor] place reliance on [the sponsor's] relationship with her adult children in respect of this claim, although Mrs Omojowho stated in her evidence that she wanted to be with her four children and two grandchildren, all of whom are in the United Kingdom.
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> 23. In fairness to [the appellant] and [the sponsor], they make no claim that because of [the sponsor's] relationship with her children they should be permitted to stay. No doubt [the sponsor's] relationship with her adult children is not what she would hope, and that is to be regretted. However, it is also clear that the relationship cannot carry any weight in determining whether there would be 'insurmountable obstacles' to [the appellant] returning to Nigeria, and, if necessary, [the sponsor] accompanying her *[sic].*
>
> 25. … [Judge Clarke] was dealing with precisely the same issue, albeit [the appellant] did not on this occasion seek to rely on the relationship between [the sponsor] and Precious as creating an 'insurmountable obstacle' to him and [the sponsor] continuing their family life outside of the United Kingdom. I must and do give considerable weight to the findings of First-tier Tribunal Judge Clarke."

29. Ms Delbourgo, who represented the appellant before Judge Rayner, sought to persuade Judge Rayner that the issues considered in the applicant's previous appeal were different and that this would be a ground for not following Judge Clarke's decision or his findings of fact. Judge Rayner dealt with this submission at paras 24 and 25 where he said:

> "24. Ms Delbourgo submitted that the previous application and appeal had focussed exclusively or mainly on the relationship between [the sponsor] and Precious, and that would be a ground for not following First tier Tribunal Judge Clarke's decision or his findings of fact. I do not agree. Paragraph 6 of Tribunal Judge Clarke's determination,

quoted at paragraph 20 above, makes it clear that he was dealing not only with the relationship between [sponsor] and Precious, but primarily with [the appellant's] family life and relationship with [the sponsor], and her relationship with Precious was just an element of [the appellant's] family life. Tribunal Judge Clarke was plainly dealing with the whole of EX. 1, which he quotes in full at paragraph 24 of his determination. Having considered the relationship between [the sponsor] and her children, Tribunal Judge Clarke makes the following findings about the relationship between [the appellant] and [the sponsor], as well as whether there were 'insurmountable obstacles' to [the appellant] and [the sponsor] continuing their family life outside of the United Kingdom: …

25. No arguable error on a point of law was found by the First-tier or Upper Tribunal in First-tier Tribunal Judge Clarke's determination, which was promulgated fewer than 18 months ago in July 2018. I do not accept Ms Delbourgo's submission that the previous Tribunal Judge was dealing with a different issue from me. He was dealing with precisely the same issue, albeit [the appellant] did not on this occasion seek to rely on the relationship between [the sponsor] and Precious as creating an 'insurmountable obstacle' to him and [the sponsor] continuing their family life outside of the United Kingdom. I must and do give considerable weight to the findings of First-tier Tribunal Judge Clarke."

30. Judge Rayner said, at para 21 of his decision, that his starting point was the decision of Judge Clarke. He considered the decision of Judge Clarke and the evidence before him. He made the following findings:

(i) There were no insurmountable obstacles to family life being enjoyed between the appellant and the sponsor in Nigeria, stating at para 26:

"26. I have considered the witness statements of [the appellant] and [the sponsor] carefully. Neither refers to the previous determination. Neither were able to answer Mr Main's question as to what had changed since that determination, other than to say that they thought it was wrong and that because of their ages they could not re-establish themselves in Nigeria. [The appellant] has given no reason for not following First-tier Tribunal Judge Clarke's findings of fact, or of any change in circumstances since the decision. I adopt in their entirety First-tier Tribunal Judge Clarke's findings of fact."

(ii) The appellant would not experience very significant obstacles to his reintegration in Nigeria, stating at paras 28 and 29:

"28. Applying the facts to the legal provisions, First-tier Tribunal Judge Clarke found that there were no 'insurmountable obstacles' to [the appellant] and [the sponsor] continuing their family life outside of the United Kingdom; nor very significant obstacles' to [the applicant's] integration into Nigerian society. I give due weight to the fact that [the sponsor] is a UK national. Of itself however that cannot be a determining feature, as EX.I applies primarily to UK nationals. [The appellant] has spent the majority of his life in Nigeria. [The sponsor] is familiar with life in Nigeria by way of heritage, family connections and visits. There are no language or cultural bars to [the appellant] and [the sponsor] establishing themselves in Nigeria. Both [the appellant] and [the sponsor] have family in Nigeria who could support them while they re-establish themselves there. Both have transferable skills to establish themselves in Nigeria. While there would be, as First-tier Tribunal Judge Clarke identified, a degree of upheaval and readjustment involved, there were no 'insurmountable obstacles' to [the appellant] and [the sponsor] continuing their family life together there; nor were there 'very significant obstacles' to [the appellant] integrating into Nigeria.

29. Nothing of substance had changed since First-tier Tribunal Judge Clarke's determination. [The appellant] cannot establish entitlement under the Immigration Rules."

(iii) Judge Rayner then considered the appellant's Article 8 claim outside the Immigration Rules and concluded that the decision was proportionate, saying, in relation to proportionality as follows at paras 33-38:

"33. In applying the provisions of section 117B of the 2002 Act, I note that the maintenance of immigration control is in the public interest. It must weigh heavily in the balance that [the appellant] cannot satisfy the Immigration Rules. Although he does not have the requisite certificate, I accept that [the appellant] is fully proficient in English, which is a neutral feature. [The appellant] is not himself financially independent as he does not work. However, he is not reliant on public funds, as his wife supports him. [The applicant's] relationship with [the sponsor] is genuine and subsisting, and was established at a time when he was here lawfully, insofar as he had limited leave to remain when the relationship started and developed and when he and [the sponsor] married. I am therefore not limited as to the weight I can give that relationship. As for [the appellant's] private life, the only evidence I have of it is his relationship with [the sponsor]. In any event, such private life as he has established was while his immigration status was 'precarious': although he was here lawfully, he had only limited leave to remain and not with leave on a settlement route, so could not have anticipated being given further leave. Nevertheless, because he was here lawfully, I do give weight to the private life he has established.

34. Ms Delbourgo submitted that there had been a delay in immigration control that would reduce the public interest in the removal of [the appellant]. She relied on **EB Kosovo v SSHD** [20081 UKHL 41. That case was explained in **Agyarko** in the following terms:

> 52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse.

35. I do not find that any legitimate criticism can be made of the respondent in this respect. [The applicant's] leave expired on 21 January 2016. Since then he has made two applications for leave to remain, which have been dealt with expeditiously. There has been no '*protracted delay in the enforcement of immigration control'.*

36. The effect of refusing [the applicant's] appeal is that he is likely to leave or be removed from the United Kingdom. For the reasons given above, that would not be disproportionate because there are no 'insurmountable obstacles' to him and [the sponsor] continuing their family life in Nigeria. Alternatively, [the appellant] may elect to leave the United Kingdom and apply for entry clearance from Nigeria. I asked Ms Delbourgo whether it would be 'proportionate' for [the appellant] to return to Nigeria to make an entry application. That is based on the following passage from **Agyarko**:

> 51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the LIK 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.

37. First-tier Tribunal Judge Clarke had dealt in detail with a 'freestanding' Article 8 claim, including the **Chikwamba** issue. Having cited the authorities, the Judge concluded, "*I do not find it disproportionate for the Appellant to return to Nigeria and make an entry clearance application. There is nothing in the Appellant's circumstances that would tip the balance in favour of the Appellant and outweigh the strong public interest in maintaining effective immigration control. I place reliance on my findings that the Appellant cannot*

meet the requirements of the Immigration Rules. I find the decision to remove is justified, lawful and proportionate" paragraph 68.

38. I can only agree with that assessment. Indeed, Ms Delbourgo gives no reason for departing from it. This appeal was in essence a rerun of [the applicant's] 2016 application and consequent 2018 appeal. The facts are the same, the law is unchanged, First-tier Tribunal Judge Clarke's decision was found to be unchallengeable. I dismiss he appeal for the same reasons as identified by the previous Tribunal Judge."

The grounds

31. Para 2 of the grounds of appeal summarise the grounds of appeal as follows:

(i) Ground 1: Judge Rayner misapplied the guidance in Devaseelan * [2002] UKIAT 00701.

(ii) Ground 2: Judge Rayner failed to take account of the best interests of a child contrary to s.55 of the Borders, Citizenship and Immigration Act 2009 and Home Office guidelines issued pursuant to s.55.

(iii) Ground 3: Judge Rayner failed to give "*due regard*" to s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") by "*not taking due account of economic considerations*". The said "*economic considerations*" are explained at paras 21, 22 and 27 of the grounds which I quote at para 61 below.

(iv) Ground 4: Para 2(iv) explains ground 4 as follows: Judge Rayner erred in equating the instant appeal *"in which some reliance was placed on EX.1. of Appendix FM in order to comply with paragraph E-LTRP.2.2(b) (the immigration status requirements)"* with "*a free-standing Article 8 claim*".

(v) Ground 5: In the circumstances, the proportionality assessment called for by Article 8(2) of the ECHR was not properly conducted.

32. At para 2 of the sponsor's July 2020 statement, she refers to the fact that the respondent did not mention the decision of Judge Clarke in the decision letter dated 14 June 2019 and that the respondent only mentioned the decision of Judge Clarke at the hearing before Judge Rayner. She therefore submits that there was a significant procedural error on the part of the respondent and that paras 9-14 of the respondent's (.e. Mr Lindsay's) submissions dated 13 July 2020 cannot be sustained.

Submissions

33. I shall deal with the parties' submissions in my assessment below, to the extent that I consider it necessary to do so.

Assessment

34. The sponsor's July 2020 witness statement advances legal submissions as well as making statements of fact. This is inappropriate, in my view.

35. At paras 4, 5 and 6 of her July 2020 statement, the sponsor says

> "4. Family life between myself and my grandchildren, this issue came before the First Tier Tribunal (FTT) about which the Judge interrogated me, and I told the Judge that my children and my grandchildren do visit us (my husband and I) regularly. I am still supporting my youngest daughter (Precious) financial including paying for her medications as evidenced in the bank statement and Whatsapp printout enclosed herewith Therefore, the Respondent's (Lindsay's) submission at paragraph 17 that "*There does not appear to be any suggestion that the submissions now advanced under this ground were made before the FTT"* is completely incorrect.
>
> 5. As recent as May 2020, when my youngest daughter (Precious) was ill, she was with us and I looked after her and paid for her medications and evidence of this is found in my bank statement. Therefore, I submit that the Respondent's submissions as advanced in paragraphs 18 to 20 are totally incorrect. To the contrary, family life exists between us meaning my husband and I, and between us and my children and grandchildren. We are one big family, and we enjoy family life together.
>
> 6. … My six siblings are all here in the UK. I do not have anyone in Nigeria. My parents are dead…."

36. Attached to the sponsor's July 2020 statement is a Barclays bank statement for an account in the name of Mercy Venture Limited. Three items, which have been marked with an asterisk, show payments of £100, £39.98 and £50 respectively and which it appears are relied upon as evidence that the sponsor has paid for medication for Miss Precious.

37. The grounds of appeal also refer to the sponsor's grandchildren.

38. Para 3 of Ms Delbourgo's submissions dated 2 July 2020 refers to the sponsor's *"developing relationship with her young grandchildren (and consequent rapprochement with her adult children)*" as a new factor justifying departing from the findings of Judge Clarke.

39. I have carefully considered all the material before me in order to ascertain what evidence Judge Rayner had of the sponsor's contact with Miss Precious, her other children and her grandchildren.

40. There are on file two bundles of documents submitted on the appellant's behalf as follows: (a) a bundle containing 15 documents submitted with the Notice of appeal under cover of an undated letter by A.Vincent Solicitors which was signed on 25 June 2019 (hereafter the "appellant's bundle A" or "ABA"); and (b) a 237-page bundle of documents (hereafter the "appellant's bundle B" or "ABB").

41. Having considered all of the material on file, including Judge Rayner's record of the proceedings (hereafter the "RoP"), I am absolutely satisfied as follows:

    (i) The only evidence that Judge Rayner had before him of the sponsor's contact with Miss Precious was the evidence that was before Judge Clarke. That evidence had been considered by Judge Clarke.

    (ii) In particular, it is to be noted that the sponsor did not mention Miss Precious *in terms* in her witness statement dated 22 August 2019 other than to refer to her in general terms at para 17 (ABB/111-114) as follows:

> "my four children who also were born here and are all British citizens and are settled in the UK".

(iii) Furthermore, it should be noted that the sponsor did not mention Miss Precious at all in her oral evidence.

(iv) Apart from that what she said about her children at para 17 of her witness statement dated 22 August 2019 (ABB/111-114), the sponsor did not mention her other three children in the appeal before Judge Rayner. Accordingly, the only evidence that Judge Rayner had about the sponsor's contact with her other children was the evidence that was before Judge Clarke. Judge Clarke had considered that evidence.

(v) In relation to the grandchildren, the only evidence that Judge Rayner had before him of the sponsor's grandchildren was given by the sponsor in re-examination. In re-examination, she was asked if she had any grandchildren and she said: "*2 boys*". She was then asked how old they were and she said: "*2 and 4*".

(vi) It is to be noted that the sponsor did not even mention her grandchildren at para 17 of her witness statement dated 22 August 2019. This is a striking omission.

(vii) It is also to be noted that the sponsor's evidence in re-examination amounts to evidence of the *existence* of two grandchildren but she did not give any evidence at all that she had any contact with them.

(viii) There was no evidence at all before Judge Rayner that the sponsor's siblings are in the United Kingdom and/or that she does not have any family in Nigeria. The only evidence that Judge Rayner had before him in this regard was the evidence that was before Judge Clarke. That evidence had been considered by Judge Clarke.

42. I am therefore absolutely satisfied that paras 4 and 5 of the sponsor's July 2020 statement, to the extent that it refers to anything other than the mere existence of two grandchildren, constitutes fresh evidence which was not before Judge Rayner and which therefore cannot be relied upon in order to establish that he erred in law.

43. Judge Rayner referred to the sponsor's oral evidence of her grandchildren at para 22 of his decision, quoted at my para 28 above. I am satisfied that what he said at para 22 of his decision correctly represented the sum total of the evidence that was before him about the sponsor's grandchildren. I am satisfied that he did not overlook relevant evidence.

44. Likewise, I am satisfied that the sponsor's assertions at para 6 of her July 2020 statement that her siblings are all in the United Kingdom and that she does not have family in Nigeria constitute fresh evidence that was not before Judge Rayner and therefore cannot be relied upon in order to establish an error of law. Likewise the evidence attached to the sponsor's July 2020 statement, including the bank statement relied upon to show that the sponsor has paid for medication for Miss Precious on three occasions, the evidence of the *Whatsapp* messages and the photographs.

45. The final paragraph of para 6(ii) of the grounds contends, in the context of ground 1, that the *existence* of grandchildren constitutes a material change from the evidence that was before Judge Clarke. This is a wholly untenable submission. Given that

there was no evidence at all before Judge Rayner that the sponsor had any contact with her grandchildren, the submission that the mere existence of grandchildren constituted a material change is wholly untenable.

46. The significance of the fact that there was no evidence before Judge Rayner of any contact between the sponsor and her grandchildren becomes clear when one considers Judge Clarke's findings concerning the sponsor's contact with her children, i.e. that she had not seen her son Neil since the latter part of 2014, that she had not seen her son Glen since 2016 and that her contact with her daughter, Miss Precious, was mostly by telephone. In these circumstances, there was simply no basis for any inferences to be drawn, *by the mere existence of two grandchildren*, that the sponsor had any meaningful contact with her grandchildren and/or that their best interests would in any be affected adversely if she decided to relocate to Nigeria to enjoy family life with the appellant there.

47. Accordingly, there is no foundation at all for the submission at para 3 of Ms Delbourgo's submissions dated 2 July 2020 where she refers to the sponsor's *"developing relationship with her young grandchildren (and consequent rapprochement with her adult children)*" as a new factor justifying departing from the findings of Judge Clarke.

48. Indeed, I cannot see how Ms Delbourgo, who appeared before Judge Rayner and who also drafted the grounds of appeal and the appellant's submissions dated 2 July 2020, could properly have referred to the sponsor's "*developing relationship with her young grandchildren"* and her *"(consequent rapprochement with her adult children)*".

49. I turn now to deal with the grounds.

50. Ground 1 contends that Judge Rayner erred in following the guidance in Devaseelan. It is said that Judge Clarke's findings should have had little bearing on the outcome of the appeal that was before Judge Rayner for various reasons which I will now summarise, as follows:

    (i) It is said (para 6(i) of the grounds) that the hearing before Judge Clarke took place over a year earlier; that the appellant had given evidence in the appeal before Judge Rayner that he did not now have available the financial resources which would enable him to set himself up in Nigeria whereas his evidence in the previous appeal according to para 44 of Judge Clarke's decision was that he had savings from the sale of a property in Nigeria.

    (ii) The sponsor was over a year older than she was at the time of the hearing before Judge Clarke. The sponsor and the appellant gave evidence that at the sponsor's age she would struggle to find a job in Nigeria.

    (iii) There was no mention in the appeal before Judge Clarke of the sponsor's grandchildren whereas the sponsor had given oral evidence before Judge Rayner that she had two grandchildren who were aged 2 years and 4 years.

    (iv) The appellant had submitted documents in the appeal before Judge Rayner that the sponsor worked for the NHS as a nurse with earning substantially in excess of the minimum income threshold.

(v) Time had passed since the decision of Judge Clarke. In this regard, it is to be noted that a period of 1 year 4 months elapsed between the hearing date before Judge Clarke (8 June 2018) and the hearing date before Judge Rayner (21 October 2019).

51. However, point (i) ignores the fact that Judge Rayner found (at para 28 of his decision) that both the appellant and the sponsor have family in Nigeria who could support them and that there was no evidence before Judge Rayner to the contrary (see my para 41(viii) above). I have already dealt with point (iii) which relates to the sponsor's grandchildren. Point (iv) ignores the fact that the respondent accepted in the refusal letter that the sponsor's income was more than the minimum income threshold, as Judge Rayner said at para 18(iv) of his decision.

52. Judge Rayner was aware of the passage of time but, as he said at para 29 of his decision, nothing of substance had changed since Judge Clarke's decision. Indeed, I am satisfied that, on the evidence before Judge Rayner, the appellant's claim before Judge Rayner was weaker, not stronger, than his claim before Judge Clarke because there was no attempt in the appeal before Judge Rayner to rely upon the sponsor's relationship with any of her children and the grandchildren were only mentioned in her oral evidence in bare terms. It is therefore self-evident that points (ii) and (v) amount to no more than a disagreement with the decision of Judge Rayner.

53. For the reasons given above, there is no substance in the appellant's submissions dated 2 July 2020 in relation to ground 1.

54. I turn to the attempt at para 2 of the sponsor's July 2020 statement to rely upon an alleged procedural error on the part of the respondent in order to suggest that Mr Lindsay's submissions at para 9-14 (in relation to ground 1) cannot be sustained.

55. However, the fact is that the respondent is entitled to make submissions on the grounds on which permission was granted. If there was any procedural error, that does not, of itself, disentitle the respondent from making submissions in response to the grounds on which permission was granted. Further, and in any event, the appellant was represented by Counsel at the hearing before Judge Rayner. No objection was raised to the respondent's production of the decision of Judge Clarke. Indeed, it is difficult to see how any such objection could properly have led to the decision of Judge Clarke being excluded, given that the appellant and the sponsor confirmed in evidence that they were aware of the previous decision and that, if they had required time to consider the decision of Judge Clarke before the hearing commenced, their Counsel would no doubt have requested Judge Rayner to allow them some time.

56. Para 7 of the grounds then contends that "*the legal context of the appeal presently being considered was so different, for reasons explored in more detail below*" that Judge Clarke's ruling should have had little bearing on the outcome of the present appeal.

57. What then follows is ground 2 which relies upon s.55 and the best interests of a child. Paras 12-15 of the grounds then state:

> "12. It is submitted that the advent of grandchildren is likely to have altered the relationship of the Appellant's spouse with her adult children. A grandmother, especially one with medical knowledge, may be a welcome resource for parents with young children - whilst grandparents may welcome contact with the young children.
>
> 13. In this particular case the very night shifts, which Judge Clarke noted (at paragraph 26 of his judgment) as causing the Appellant's wife to forgo custody of her younger children, it is submitted should mean that she would be available during the day to take care of her grandchildren whilst their parents might be at work.
>
> 14. The grandchildren themselves, it is submitted, would benefit from support from their extended family.
>
> 15. It is submitted that were the Appellant's spouse to be obliged to return to Nigeria she would not be able to provide such support so she would have to choose between her husband and her grandchildren."

58. I was surprised to read these submissions, as it is plain that they could not properly have been made, especially in view of the fact that the author of the grounds was Ms Delbourgo who appeared before Judge Rayner and who therefore ought to have been aware that paras 12-15 of the grounds amounted to pure speculation and supposition as there was no such evidence before Judge Rayner.

59. There is therefore no substance at all in the submissions at paras 16 and 17 of the grounds in relation to ground 2, that Judge Rayner erred in failing to consider the best interests of the sponsor's grandchildren in his consideration of whether the appellant satisfied the requirements of para 276ADE(1) or whether there were insurmountable obstacles to family life between the appellant and the sponsor continuing outside the United Kingdom or whether there were exceptional circumstances.

60. For the reasons given above, I reject paras 9-12 of the appellant's submissions dated 2 July 2020 in relation to ground 2. There is no foundation at all to ground 2.

61. Ground 3 contends that Judge Rayner failed to give "*due regard*" to s.117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") by "*not taking due account of economic considerations*". Paras 18-27 of the grounds begin by referring to Judge Clarke's decision, including paras 27 and 33 thereof, to the effect that the sponsor has been providing financial support to three households out of her earnings as a nurse whereas she gave evidence to Judge Rayner that she would not now be able to find a job in Nigeria due to her age and the appellant gave evidence that he did not now have financial resources to set himself up in Nigeria. Paras 21, 22 and 27 of the grounds then state:

> "21. It is submitted that although the Appellant and his wife might have been welcomed in Nigeria as benefactors that would not necessarily be the case if they now returned as supplicants.
>
> 22. The Appellant's spouse may feel constrained to remain in the UK for financial reasons at some cost to her emotional well-being just as Judge Clarke noted at paragraph 26 of his judgment that the demands of her job meant she had previously to forgo custody of her younger children.
>
> 27. Moreover, as the Appellant's spouse has been providing financial support in the UK to her ex-husband and adult child, were she to accompany the Appellant if he was obliged to

> return to Nigeria, then, it would increase the possibility that those others she had been supporting in the UK would become a burden on the state."

62. Para 14 of the appellant's submissions dated 2 July 2020 also refer to the sponsor providing support for several households. However, there was no evidence before Judge Rayner that, as at the date of the hearing before him, the sponsor continued to provide financial support to her adult children.

63. It is self-evident that paras 21 and 22 of the grounds are based on supposition and speculation and/or amount to an attempt to re-argue the decision of Judge Rayner.

64. There is no foundation at all for the assertion that Judge Rayner failed to take into account "*economic considerations*" because the said "*economic considerations"* are in fact mere suppositions and speculation, which is surprising given that Ms Delbourgo appeared before Judge Rayner and was the author of the grounds.

65. Para 26 of the grounds contends that Judge Rayner failed to note that Judge Clarke had interpreted s.117B as to financial independence incorrectly, in that, he penalised the appellant for not being financially independent but was instead dependent upon his wife. Para 26 of the grounds draws attention to the fact that the Supreme Court's decision in Rhuppiah v SSHD [2018] UKSC 58 was a change in the law since the decision of Judge Clarke.

66. However, this submission simply ignores the fact that Judge Rayner did not make that error. He specifically said, at para 33 of his decision, that the appellant is not reliant on public funds as his wife supports him.

67. I therefore reject ground 3.

68. I turn to ground 4.

69. The reader would be forgiven for not understanding ground 4 as described at para 2(iv) of the grounds - see my para 31(iv) above. Paras 29-38 of the grounds explain ground 4 under the heading "*Different legal context*". In effect, it is contended as follows:

    (i) The appeal before Judge Clarke was a free-standing Article 8 appeal. This was because the application to which that appeal related was an application for leave to remain as a parent but Judge Clarke found that the appellant was not a parent of a child under the age of 18 and therefore he could not succeed under the parent route.

    (ii) The appeal before Judge Rayner was an appeal that related to an application for leave to remain as spouse. The respondent had accepted that the appellant satisfied the suitability requirements as well as the requirements as to eligible relationship and the financial eligibility requirement. Whilst the respondent did not accept that the appellant met the English language requirement, Judge Rayner accepted at para 33 that the appellant was proficient in English. Accordingly, "*the only infraction*" in the instant appeal was the immigration status requirement. In this regard, the appellant's immigration history shows that his periods of overstaying were "*relatively minor*".

(iii) Thus, whilst Judge Clarke was faced with "*a glaring breach of the immigration rules*", Judge Rayner was faced with "*a different type of application where the infraction was much more minor*".

(iv) Para 38 of the grounds then states:

> "Insofar as the previous determination was relevant at all, it is submitted that Judge Rayner wrongly applied the same weight to the Appellant's breach of the Immigration Rules as Judge Clarke had done in very different circumstances."

(v) Para 17 of the appellant's submissions dated 2 July 2020 contends that fairness required Judge Rayner to consider the appellant's Article 8 claim afresh.

70. It was argued before Judge Rayner that the appeal before Judge Clarke was in a different legal context because the appeal before Judge Clarke concerned an application for leave to remain as a parent whereas the appeal before Judge Rayner concerned an application for leave to remain as spouse. Judge Rayner rejected Ms Delbourgo's submission that this was relevant and that he should therefore depart from the findings of Judge Clarke. The grounds contend that Judge Clarke's decision was not relevant at all or, in the alternative, that the said "*different legal context*" meant that Judge Rayner was led into the error of placing too much on Judge Clarke's findings or too much weight on the appellant's "*relatively minor infraction*" of the immigration status requirement.

71. Judge Rayner was entirely correct to reject Ms Delbourgo's submissions. The fact is that the factual issues before Judge Clarke and Judge Rayner were the same, namely, whether there were insurmountable obstacles to family life between the appellant and the sponsor continuing in Nigeria; whether there were very significant obstacles to the appellant's reintegration in Nigeria and, if the answer to both of these questions was "no", then whether there were exceptional circumstances which meant that refusal would be a breach of Article 8. Judge Rayner was therefore correct to say that Judge Clarke's findings, which were made only 1 year 4 months earlier, were a starting point.

72. Furthermore, it is unreasonable and perhaps even misleading to suggest that that there was a "*relatively minor infraction*" of the immigration status requirement in the appeal before Judge Rayner. The appellant's leave expired on 21 January 2016, as Judge Rayner correctly said at para 18(iii) of his decision. He made the application that was the subject of the appeal before Judge Clarke on 5 February 2016, i.e. out of time. Thus, as at the date of the hearing before Judge Rayner on 21 October 2019, he had been in the United Kingdom unlawfully for a period of 3 years 9 months.

73. It may be that, in referring to the "*relatively minor infraction*" of the immigration status requirement, Ms Delbourgo was referring to the fact that the appellant's application of 5 February 2016 was made only 15 days after his leave had expired on 21 January 2016. If that is so, it makes no difference to the period of his overstay as at the date of Judge Rayner's decision that he made his application only 15 days after his leave expired. It was his choice to make his application when he did. It does not make his "*infraction of the immigration status requirement*" a minor one, on any reasonable view. This part of ground 4, and the related submissions of Ms Delbourgo in her

submissions dated 2 July 2020, amount to no more than a disagreement with the weight that Judge Rayner placed on the appellant's period of overstay in the balancing exercise in relation to proportionality.

74. In his assessment of proportionality at para 33, Judge Rayner said that, although the appellant did not have the requisite English language certificate, he was proficient in English which he correctly noted was a neutral factor.

75. There is therefore no substance in ground 4. I therefore reject ground 4.

76. Ground 5 contends that, "*in the circumstances, the proportionality assessment called for by Article 8(2) of the ECHR was not properly conducted*". This is elaborated at paras 19-25 of the appellant's submissions dated 2 July 2020 which read:

> "19. For the reasons given above and in the Grounds of Appeal, it is submitted that Judge Rayner failed to properly apply the statutory guidance in ss. 117A and 117B of the Nationality Immigration and Asylum Act 2002..
>
> 20. By relying on the previous decision of Judge Clarke when considering the breach of the Immigration Rules Judge Rayner gave heavy weight to a breach, which it has been submitted was relatively minor, as Judge Clarke had done in the context of an appeal which was wholly outside the terms of the Immigration Rules.
>
> 21. Judge Rayner accepted at paragraph 33 of his judgment that the Appellant had a good standard of English.
>
> 22. Meanwhile, there were strong economic factors also weighing in the Appellant's favour.
>
> 23. Judge Rayner accepted that the negative provisions of s.117B(4) did not apply and despite the provisions of s.117B(5) afforded the Appellant some credit for a private life established whilst he was lawfully in the UK.
>
> 24. Whilst s.117B(6) might not strictly be applicable, it is submitted that by analogy with that provision the interests of the sponsor's grandchildren should favour the Appellant as the sponsor being allowed to remain in the UK.
>
> 25. Accordingly, it is clear that the balance should have come down in the Appellant's favour and it is submitted that Judge Rayner was wrong to hold otherwise."

77. Section 117B(6) of the 2002 Act applies if a "*person has a genuine and subsisting parental relationship with a qualifying child*". However, para 24 ignores the fact that there was no evidence at all b,

78. However, para 24 of Ms Delbourgo's submissions dated 2 July 2020 ignores the fact that there was no evidence at all before Judge Rayner that the sponsor had any contact at all with her grandchildren, let alone a parental relationship with them.

79. The remainder of paras 19-25 of Ms Delbourgo's submissions dated 2 July 2020 fail to identify any factors that Judge Rayner failed to take into account. In reality, paras 19-25 of these submissions amount to no more than a disagreement with Judge Rayner's assessment of proportionality.

80. For all of the reasons given above, Judge Rayner did not err in law. I therefore dismiss the appellant's appeal.

81. This is a case in which permission should not have been granted. It may be that Judge Foudy, who mentioned specifically that Judge Rayner may have failed to properly consider the best interests of children and that it was arguable that he had not taken into "*sufficient consideration the best interests of the grandchildren in the family*" mistakenly thought that there was evidence before Judge Rayner of the relationship between the sponsor and her grandchildren whereas, as I have said above, there was no evidence that she had any contact with them.

82. Judge Rayner said, at para 38 of his decision, that the appeal before him was a re-run of the appellant's 2018 appeal. It may be said that this was a generous description because the evidence in the appeal before Judge Rayner was weaker, as reliance was not placed in the appeal before Judge Rayner on the sponsor's relationship with *any* of her children and she only barely mentioned the existence of two grandchildren, giving no evidence at all that she had any contact with them. It is therefore difficult to see how the respondent reached the conclusion that the appellant's application of 24 April 2019 was a *"fresh claim"* within the meaning of para 353 of the Immigration Rules.

Notice of Decision

83. The decision of the First-tier Tribunal did not involve the making of any error on a point of law such that it fell to be set aside. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Upper Tribunal Judge Gill Date: 16 September 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**