Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13586/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre (remote)
On: 5th March 2021

Decision & Reasons Promulgated
16th June 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Olalekan Munir Azeez
(no anonymity direction made)

Appellants

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Tampuri, Counsel instructed by Tamsons Legal Services**
For the Respondent: **Ms Pettersen, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Nigeria date of birth 5th October 1978. He appeals with permission against the decision of the First-tier Tribunal (Judge Siddiqi) to dismiss his appeal on human rights grounds. The Appellant seeks further leave to remain in the United Kingdom with his partner.

Background and Matters in Issue

2. The background facts are as follows. The Appellant was a long term overstayer when in 2012 he submitted an application for leave to remain on human rights

grounds. The Secretary of State granted the Appellant limited leave, in recognition of his Article 8 rights. This was valid until May 2015 and the Appellant was subsequently the beneficiary of a further grant, valid until June 2018. The Appellant however failed to make an application for further leave in time. He waited for some seven months after the expiry of that last grant before making a new application.

3. So it was that the Secretary of State found the Appellant to be an overstayer, who could not meet the 'eligibility' requirements under Appendix FM. Although it was accepted that the Appellant is in a genuine and subsisting relationship with his partner, and that they meet the financial requirements of the rules, the Appellant had not demonstrated that there would be "insurmountable obstacles" to family life continuing outside of the United Kingdom: paragraph EX.1 of Appendix FM applied. For good measure the Appellant had failed to provide an English language test certificate. Leave was therefore refused under the 'partner' route. The Secretary of State went on to consider whether leave should be granted on 'private life' grounds and decided that it should not. Finally she considered whether there were what she continues to call "exceptional circumstances" – ie was the decision to interfere with the Appellant's Article 8(1) rights disproportionate – and concluded that leave should not be granted.

4. The Appellant appealed. The matters in issue before the First-tier Tribunal were therefore:

   a) Are there insurmountable obstacles to this family life continuing in Nigeria or elsewhere?

   b) Does the Appellant qualify for leave on any of the alternative 'private life' provisions in paragraph 276ADE(1) of the Immigration Rules?

   c) If the answer to either or both of the above is negative is the decision nonetheless disproportionate?

5. The First-tier Tribunal decided all three matters against the Appellant and the appeal was dismissed.

6. The Appellant was granted permission to appeal on the 17th March 2020 by Designated Judge of the First-tier Tribunal Shaerf. Although Judge Shaerf commented that some grounds disclosed no arguable error in themselves, he was prepared to grant on an unrestricted basis. I therefore must address all the grounds raised.

Error of Law: Discussion and Findings

7. Ground 1 is that the First-tier Tribunal erred in departing from a concession of fact. The First-tier Tribunal recorded at its [§13] that the Appellant did not meet the financial requirements of the Rules, but the Secretary of State had already accepted that he did.

8. As a matter of fact, this ground is correct. The Secretary of State's refusal letter is dated the 1st August 2019 and on page 3 the following concession can be found: "you meet the eligibility requirement paragraphs E-LTRP.3.1 to 3.4". At its [§13] the First-tier Tribunal incorrectly states that the Appellant "accepts that the … financial requirements of the Rules were not met". This error is however entirely immaterial, as it can be seen from [§26(c)] of the Tribunal's decision that when it came to weighing the question of finances in the balance, the Tribunal got it right:

> "Section 117B(3) states that it is in the public interest that persons seeking leave to remain in the UK are financially independent. The Respondent accepted that the Appellant meets the financial requirements of the Rules".

9. Again at its [§33(f)], it is clear that the Tribunal appreciated what matters were left in issue under the Rules. Ground 1 is accordingly not made out.

10. Ground 2 is that the First-tier Tribunal "erred" in applying s117B(5) Nationality, Immigration and Asylum Act 2002 to the effect that only a "little weight" could be attached to a private life established when a person's immigration status is precarious. That ground is not particularised. It appears to relate to [§26(d)] of the First-tier Tribunal decision, where the Tribunal simply directed itself to the terms of the statute. I can see no error in that. The Tribunal was bound to apply the statute. Ground 2 is not made out.

11. Ground 3 relies on the decision in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 to submit that s117B(4) only mandates "little weight" to be placed on a relationship where that relationship is established when the person concerned is in the United Kingdom unlawfully. That is undoubtedly a correct reading of the law and Rhuppiah, but the grounds do not go on to explain where the error lies. The implication is that perhaps the First-tier Tribunal misunderstood that this was a relationship formed when the Appellant's status was *precarious* rather than *unlawful.* On the facts as stated it is not altogether clear whether that is true but that is irrelevant, since the First-tier Tribunal nowhere directs itself to give this relationship "little weight". Ground 3 is not made out.

12. Ground 4 is that the First-tier Tribunal erred finding "no reason why the appellant could not retain her indefinite leave status by making frequent re-entry to the UK". I assume that this reference is in fact to the Sponsor. It is asserted that the point which should have been considered was that in leaving the United Kingdom the Sponsor would be precluded from acquiring British citizenship as she would not be able to meet the residence requirement. I am not persuaded that there was any arguable error in the First-tier Tribunal failing to expressly consider whether the Sponsor would be materially disadvantaged by moving to Nigeria. Even if it could be established that the loss of opportunity to apply for naturalisation at some point in the future – it can be put no higher than that – were material to the overall balancing exercise, it is

evident from the reasoning set out in respect of her ILR at FTT §32 that it is not a matter that was capable of attracting any significant weight. Whilst the Sponsor may lose the benefits that residents of the United Kingdom enjoy – such as access to the NHS – she is also a Nigerian national, and enjoys the benefit of that status. In enacting s117B parliament expressly envisaged that spouses of foreign nationals who do not meet the requirements of the rules can be expected to live abroad: that is further reflected in the rules at EX.1. It is trite that Article 8 does not confer upon couples a choice of where to set up the family home: it cannot therefore be said that her sacrifice, in giving up what she has here to relocate to Nigeria, would make this decision disproportionate.

13. It is not until paragraph 18 of the grounds that we reach the crux of the appeal, where three successive grounds all engage with questions relating to the *Razgar* proportionality assessment. First, the question was not simply whether this couple *could* return to Nigeria, as they unquestionably could, but whether it was proportionate to expect them to do so. Second, that in conducting the proportionality balancing exercise the Tribunal failed to take material matters into account, including the fact that the pregnant Sponsor had not been to Nigeria in over 11 years, no longer had any family connections in that country and had stated in evidence that she would not be able to cope with looking after the baby on her own in the event that she remained here after her partner was removed to Nigeria. Third, whether the Tribunal should have applied the *Chikwamba* principle to this appeal.

14. I deal with the latter point first. It has no merit. In Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 the Appellate Committee considered the case of a woman from Zimbabwe who was required by the Home Office to return to the "harsh and unpalatable" conditions in that country in order to make an application for entry clearance to come back and resume family life with her refugee husband. It was common grounds that the application would have succeeded, since she was able to meet all of the relevant requirements of the rules. What then, the Appellate Committee asked, was the point of making her go all the way back to Zimbabwe rather than simply allowing her to make the notional application for 'entry' – ie an in-country Article 8 claim – here? The facts in the present case are not so clear cut. As Judge Siddiqi notes, the Appellant had failed to produce an English language certificate evidencing his ability to meet the requirements of Appendix FM E-LTRP 4.1. It could not therefore be said that any application made by the Appellant in Nigeria would be bound to succeed: it was not a Chikwamba case. Before me Mr Tampuri argued that the Tribunal should have exercised common sense: it had heard the Appellant give his evidence in fluent English and should have been aware that as a Nigerian he would have been educated in that language. I am unable to accept that an individual claimant's likely ability to pass the required language test is a matter upon which a Judge could properly take judicial notice. The fact that the Appellant can speak English is no guarantee that he will be able, for instance, to pass the written component of the test. Were it obvious that as a Nigerian national he would be able to do so,

Nigeria would no doubt appear on the list of approved English speaking countries at GEN.1.6 of Appendix FM.

15. Turning to the wider questions about the exercise conducted by the First-tier Tribunal, I would begin by noting that this was not an appeal that every judge would have dismissed. The Appellant does not have a good immigration history, but the Respondent had been prepared to overlook this in the past, having granted him two successive periods of leave between 2012 and 2018. He had been here for a long time, on his evidence since 2003. He had established a small business, a bakery which had employed other people until it was destroyed by fire in 2018. It was in the aftermath of that fire that the Appellant failed to make his application for further leave in time. There is no doubt that he and his current partner enjoy a family life together and that at the date of the appeal she was pregnant with his child. That partner has herself lived in this country a long time and is settled here; her home, job, family and friends are all in the United Kingdom. She works in the NHS as a nursing assistant. It would be difficult for her to give all of that up to return to Nigeria. She did not want to travel to Nigeria whilst she was pregnant, particularly since she suffers from sickle cell anaemia. The couple love each other and understandably want to remain together here, where they have established a life together. On those facts a judge might well have determined that it would be disproportionate to refuse further leave. That was not however the decision of Judge Siddiqi, and I cannot interfere with her decision because it could have been otherwise. The question is whether she erred in her approach.

16. The Tribunal certainly started in the right place. It sensibly began by assessing whether or not this couple could meet the test at EX.1 of Appendix FM: whether there were "insurmountable obstacles" to family life continuing outside the United Kingdom. Here the decision notes that both Appellant and Sponsor were born and brought up in Nigeria, and that they both continue to hold Nigerian citizenship. They both do have some family members in that country, are familiar with the culture and there was no reason why they could not work to support themselves. The Tribunal expressly notes that the Sponsor is pregnant, but finds there to be a complete absence of any evidence to indicate that she would be unable to obtain medical treatment there. None of those factual findings are challenged in this appeal and I am satisfied that cumulatively they provided a sound foundation for the conclusion that the Appellant could not meet the "insurmountable obstacles" test as it is elaborated in EX.2 and Agyarko v Secretary of State for the Home Department [2017] UKSC 11. The Appellant therefore failed under the rules, and that was an important factor going into its wider assessment of proportionality.

17. This assessment fell into two parts. First the Tribunal considered whether it would be reasonable to expect the couple to relocate to Nigeria. It notes the Sponsor's reluctance to do so, but directing itself to the decision in AS (Pakistan) v Secretary of State for the Home Department [2008] EWCA Civ 1118 finds this to be a factor attracting limited weight: she was in effect a Nigerian

national arguing that it did not matter that her husband failed to meet the requirements of the rules because she should not be expected to give up her private life. There was no evidence, found the Tribunal, to suggest that the Sponsor, and indeed the Appellant, would not be able to establish a new private life in Nigeria. Nor, the Tribunal reiterated, was there any medical evidence to indicate that either of them might have any problems in accessing treatment there. This was a point picked up by Mr Tampuri in submissions before me, in which he stressed that the Sponsor has sickle-cell anaemia. I accept that the Tribunal does not make reference to that matter, but this is I am afraid hardly surprising, given that the evidence on it was limited to a single line in her medical notes. There was no evidence before the Tribunal about whether this diagnosis could cause her or her unborn child any problems in Nigeria, or whether it could cause complications in the pregnancy, or whether she would for instance be taking a risk in flying. In the absence of any evidence that this would pose a particular problem for the Sponsor there can have been no error in the First-tier Tribunal failing to identify it as such. Overall I am unable to find that there was any error in approach by the Tribunal. A relocation to Nigeria would undoubtedly be challenging and perhaps distressing for the couple, in particular the Sponsor, but in the final analysis these were two adult Nigerian nationals who have both lived and worked in that country: there was no real reason given why they could not do so again. The argument boiled down to the Sponsor's reluctance to give up her life in the United Kingdom: I am unable to find any error in the Tribunal's decision that this did not render the refusal of leave disproportionate.

18. The First-tier Tribunal alternatively asks itself whether it would be disproportionate to expect the Appellant to return to Nigeria in order to make a proper application for entry in accordance with the rules. As I have set out above this was not a *Chikwamba* situation, where such a formality amounted to the elevation of policy to dogma. The question was simply whether it would be disproportionate to expect the couple to endure a temporary separation until such time as the Appellant obtained entry clearance. Again, given the above, and the operation of s117B Nationality, Immigration and Asylum Act 2002, the Tribunal reached a finding properly open to it on the evidence. No evidence was produced as to why the Sponsor could not be left alone during her pregnancy. Nor does it appear to have been argued that the Appellant would be unable to meet the requirements of the rules: indeed to the contrary it was argued that the English language tests he was required to take were simply a formality and that he would easily be able to pass them.

19. The final challenge is that the First-tier Tribunal erred in its approach to relevance of the uncontested fact that the Appellant is the biological father of a British child. The child was born of a marriage that ended over a decade ago and the evidence was vague about when he had last seen him. The First-tier Tribunal noted that the Appellant had taken no legal steps to try and secure contact with his son. In light of the admitted fact that there was no current contact the Tribunal concluded that the Appellant did not enjoy a genuine and

subsisting parental relationship with the child. Before me Mr Tampuri criticised this finding on the basis that the Tribunal had failed to give sufficient weight to the *potential* family life that might be resumed in the future. I accept that ideally notice should have been taken of the presumption that as a biological parent who was living in the family unit the Appellant at one time enjoyed a 'family life' with his son; he had in fact been granted limited leave to remain on this basis; this might in some circumstances have then informed an enquiry into whether that relationship could be re-established. This is not, however, one of those circumstances. The burden lay on the Appellant, who provided no evidence at all that he had taken any steps to try and regain contact with his child. His account of his personal history in the witness statement was rightly described as a vague: on his own evidence there was no current contact, and there does not appear to have been any contact for some years. There was in fact no lawful basis upon which a Tribunal could have allowed an Article 8 appeal on the basis of that statement.

20. For the sake of completeness I note that a late elaboration of this ground came in oral submissions. It was that the Tribunal had erred in failing to take material matter into account, viz that Appellant had been experiencing some mental health issues – described as "instability" - which had prevented him from seeking access to his son. Whilst it is true that the decision does not make any reference to this, I am not satisfied that there is any error in that. There was no evidence before the Tribunal that the Appellant was experiencing mental instability preventing him from seeking contact with his son: in fact his witness statement says that it was because he had no money, and his partner says it was because he had no leave to remain.

Decisions

21. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

22. There is no order for anonymity.

Upper Tribunal Judge Bruce
1st May 2021