Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001899
(HU/52367/2021); IA/08501/2021

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Decision & Reasons Promulgated**
On 26 August 2022	**On 3 October 2022**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

OMOLARA ABIOLA AJAO
(ANONYMITY DIRECTION NOT MADE)

<u>Appellant</u>

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Mr E Yerokun, Legal Representative
For the Respondent: Miss S Lecointe, Senior Home Office Presenting Officer

<u>DECISION AND REASONS</u>

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Head promulgated on 12 March 2022 in which she dismissed the appellant's appeal against a decision of the Secretary of State to refuse her leave to remain in the United Kingdom.

2. The factual background to the case is not in dispute/ The appellant is a citizen of Nigeria who entered the United Kingdom having made previous visits (with leave) and she last entered on 17 March 2020 with leave to

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remain as a visitor until 17 September 2020. It was during that period that everything became locked down owing to COVID and although she had intended to return to Nigeria with her now husband for them to get married and make the appropriate applications that became effectively impossible. She and her husband had had a marriage undertaken in Nigeria by way of double proxy and on on 31 July 2020 she made a human rights application for leave to remain under Appendix FM of the Immigration Rules on the basis of her family life.

3. The Secretary of State refused that application on the sole basis that she did not meet the eligibility requirements (Appendix FM, E-LTRP) because paragraph E-LTRP.2.1. requires that she must not be in the United Kingdom as a visitor.

4. It was argued on appeal that the appellant:

   (i) was entitled to the benefit of a policy which was then in place whereby the requirement not to be here as a visitor could be dispensed with; and.

   (ii) met the requirements of Appendix FM paragraph EX.1 on the basis of a genuine and subsisting parental relationship with her husband's child from a former relationship;

   (iii) met the requirements of paragraph 276ADE(1)(vi) Immigration Rules.

5. It was also argued that her removal would be contrary to her rights under Article 8 of the Human Rights Convention as she met all the requirements for entry clearance and she would be granted entry clearance if she were to return; and, on that basis applying Chikwamba v Secretary of State [2008] UKHL 40 it would be a disproportionate interference with her right to do so.

6. The judge found:

   (i) there was no policy which assisted the appellant;

   (ii) paragraph EX.1 did not apply as there was no subsisting parental relationship between the appellant and her husband's son, nor was there a genuine and subsisting relationship between the father and the son

   (iii) the requirements of EX.1 was not made out in respect of the marriage

   (iv) the requirements of paragraph 276ADE(1)(vi) were not made out; and,

   (v) having had regard to Article 8 that removal would not be disproportionate as there was no basis on which the appellant

could not reasonably return to Nigeria to make an application either with her husband or on her own to return.

7. The appellant sought permission to appeal against that decision on four grounds:

   (i) the judge had failed to have proper regard to a policy in place at the date of application whereby applicants in the United Kingdom as a visitor or with leave of up to six months could switch into the private or family life route provided that the Immigration Rules were otherwise met;

   (ii) the judge had erred with respect to the application of paragraph EX.1 of the Immigration Rules given the appellant's husband's ill health;

   (iii) the judge had erred in concluding that there was no genuine and subsisting parental relationship between the husband and his son; and

   (iv) the judge had made a number of factual errors with respect to the appellant's status, in particular not noting that the appellant had in fact leave to remain in the United Kingdom by operation of Section 3C of the Immigration Act 1971 and in concluding wrongly that her permission to be here was precarious. Permission was granted on all grounds.

8. When the matter came before me, I drew the parties' attention to the fact that it appeared to me the judge had erred with respect to the appellant's status in this country, her leave being preserved by operation of section 3C of the Immigration Act 1971. I also indicated my view that the policy to which the grounds referred had existed at the date of the application for leave, but was not publicly available at the date of decision by the Secretary of State, or for that matter the hearing before the judge. I am aware that it is available through the National Archives Web Archive but that is far from being publicly available.

9. After some discussion it was agreed between the representatives that the judge had erred with respect to the status of the appellant and that this infected her decision as to the public interest in Article 8 terms with specific reference to Chikwamba and the principles set out in Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129. The parties were also agreed that I should then proceed to re-make the decision allowing it on the basis that the public interest was not, as would normally appear to be the case, in favour of removal given the existence of the date of the application of the policy to which I have already referred.

10. I have a degree of sympathy for the judge in this case. The judge was told in the skeleton argument produced by the appellant that her visa had expired. It does not appear to have been made clear to the judge, that as

the applicant had made an application for further leave to remain in the United Kingdom prior to the expiry of existing leave, her leave to remain in the United Kingdom was extended by operation of Section 3C of the 1971 Act. Given that much of the judge's analysis of the public interest is bound up with the erroneous finding that the appellant's leave had ended. The observation that she should therefore have left the United Kingdom as her leave had already expired, indicates that this error was material and accordingly on that basis alone the decision falls to be set aside.

11. It is difficult to criticise a judge for not taking into account a policy which was not put to her and which was not publicly accessible in any event. Further, as already noted, the policy to which the judge was referred in the appellant's skeleton argument was not in fact the policy which was in operation at the relevant date. It is in the circumstances difficult to see how the judge could be said to have erred in law on that point. There is less merit in the other grounds but it is unnecessary for me to consider those given that I am satisfied that the decision needs to be set aside on the basis of ground (iv) alone.

12. I turn next to remaking the decision.

13. I am satisfied that on the particular facts of this case there was in existence at the date of the application a policy in place to the effect that, in cases of applications for leave made on or before 31 July 2020, there was a waiver of the requirement in the Immigration Rules that an individual who has leave to be here as a visitor cannot switch into the role of being here as a spouse if all the other requirements of the Immigration Rules are met. I am satisfied that that policy applied to this application and should have been applied by the respondent. Ms Lecointe did not object to my observation as a preliminary view that that is the case.

14. Given the existence of that policy, I consider that there was on the facts of this case, real public interest in removal either in terms of the principles set out in Chikwamba or for that matter Section 117B of the 2002 Act. In all the circumstances of this case in the light of the concession, and following TZ (Pakistan) and PJ (India) [2018] EWCA Civ 1109 as referred to also in Patel [2020] UKUT 351 that this appeal ought to be allowed on the basis that requiring the appellant to return to Nigeria is disproportionate having had regard to the public interest and all the other factors set out in this case.

15. Accordingly, for these reasons:

    (1) I find that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

    (2) I re-make the decision by allowing the appeal on human rights grounds.

No anonymity direction is made.

Signed Date 8 September 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul