Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2023-002493**

& UI-2023-002494

First tier Number: HU/58988/2022
& HU/58994/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 22 September 2023	**On 11th of October 2023**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) MR FRANKLIN BAMIDELE IKPEFUA
(2) MISS MAKAYLA ONANEFE AIMALOHI IKPEFUA
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Mr J Collins, Counsel

DECISION AND REASONS

1. Permission to appeal was granted by Upper Tribunal Judge Pickup on 11 August 2023 against the decision to allow the Respondents' Article 8 ECHR family life appeal made by First-tier Tribunal Judge G Clarke in a decision

and reasons promulgated on 2 June 2023. (Permission to appeal had previously been refused by First-tier Tribunal Judge Gumsley on 3 July 2023.)

2. The Respondents, father and daughter, nationals of Nigeria born respectively on 16 May 1972 and 17 May 2021, had applied for leave to remain on the basis of their family life with Mrs Onive Winnie Ikpefua ("Mrs Ikpefua") on 3 December 2021, and their private life. The applications were refused by the Secretary of State for the Home Department on 9 November 2022. The First Respondent did not meet the eligibility relationship requirement under Appendix FM as his partner was neither British nor settled in the United Kingdom. There were no insurmountable obstacles to the continuation of family life in Nigeria. There were no exceptional circumstances. Paragraph 276ADE(1) of the Immigration Rules was not met.

3. It was accepted on behalf of the Respondents that they were unable to meet the requirements of the Immigration Rules. The issues were whether leave to remain should be granted to the Respondents outside the Immigration Rules or whether they should be required to return to Nigeria to seek entry clearance.

4. The judge accepted that the First Respondent had married Mrs Ikpefua in Nigeria in 2016, that their relationship continued and that they had two children, the Second Respondent and a further child born on 20 April 2023. All lived together. All are nationals of Nigeria. Mrs Ikpefua held leave to remain as a Tier 2 Minister of Religion until 14 January 2026. The Respondents claimed that they would meet the requirements for entry clearance as a Tier 2 Minister of Religion and his dependent. The Suitability requirement was almost certainly met and the Respondents could obtain TB certificates from Nigeria. The financial requirements under MOR.25.2 and 25.3 of the Immigration Rules were met and entry clearance applications from Nigeria would be successful.

5. Judge Clarke went on to find that proportionality favoured the Respondents. He noted that immigration control was in the public interest (Article 8.2 ECHR). The Respondents' private life had been built up while they had no leave to remain so attracted little weight. Neither of the children were "qualifying children" pursuant to section 117B(6) of the Nationality,

Immigration and Asylum Act 2002. The judge noted that Alam [2023] EWCA Civ 30 had restricted the application of Chikwamba. The First Respondent's overstay was a weighty factor against him but the fact that he had tried to regularise his stay was in his favour. The judge found that the First Respondent had applied for leave to remain in 2018 and that his appeal from the Secretary of State for the Home Department's refusal had been dismissed. The First Respondent had applied again in June 2021 and then in December 2021 (the application which is the subject of the present appeal).

6. The judge found that if the First Respondent was required to return to Nigeria to seek entry clearance, he would be separated from his second child at a critical time in their bonding, as would the Second Respondent be from her sibling. The Second Respondent would be separated from her mother at a critical age, because of the delay which would arise from making an application for entry clearance from Nigeria, which was of the order of six months. That was sufficient in the judge's evaluation to render the refusal of leave to remain outside the Immigration Rules a disproportionate interference with the Respondents' family life.

7. UTJ Pickup noted that in summary the grounds seeking permission to appeal asserted that the First-tier Tribunal failed to make findings on material matters and that an incorrect standard of proof was applied. He was satisfied that it was at least arguable that the First-tier Tribunal erred in finding in the First Respondent made an application to regularise his immigration status in 2018 when there was no record of any such application having been made and even if made, it was not made until some three years after expiry of leave. It was hard to see how those facts could fall to the Respondents' credit. It was also arguable the First-tier Tribunal failed to make a finding as to the sponsor's precarious immigration status which was relevant as to whether it would be reasonable to expect the sponsor to join the appellants in Nigeria. This was an issue raised in the refusal decision but which appeared to have been ignored by the First-tier Tribunal. Permission to appeal was granted accordingly.

8. Mr Wain for the Appellant relied on the grounds of appeal and the grant of permission to appeal and submitted that the judge had misdirected himself when conducting the balancing exercise. The Immigration

Rules were not met, meaning that exceptionality of some kind had to be shown. The judge had given no consideration to the continuation of family life in Nigeria, the country of nationality where the First Respondent and Mrs Ikpefua had married. The First Respondent's repeated applications made after he had become an overstayer counted against him, not for him. The decision and reasons should be set aside.

9. Mr Collins for the Respondent submitted that sufficient and sustainable findings had been reached and explained. The judge had set out the law accurately and had given correct self directions, including using a "balance sheet" approach. His decision was open to him and was a model of its kind.

10. Contrary to the view expressed in the Upper Tribunal's grant of permission to appeal, the judge had been correct to find that the Respondent had made an application for leave to remain in 2018, which had been refused and dismissed on appeal. Although the Home Office had said that there was no record of that, it had since been established that there had indeed been an unsuccessful application by the First Respondent in 2018 which had been dismissed. It had not, however, been a determinative factor in the Article 8 ECHR evaluation.

11. The judge had been well aware that Chikwamba had in effect been put to bed. The delay which would be experienced in obtaining entry clearance was a factor to which the judge had been entitled to give weight, having taken into account the public interest which he had done. There was no basis for interfering with the judge's decision. If nevertheless the tribunal decided there had been one or more material errors of law, such that the First-tier Tribunal Judge's decision should be set aside, there should be a rehearing.

12. In reply Mr Wain submitted that there was no reason why family life could not be continued abroad. Relocation was reasonable where the Immigration Rules could not be met. There was no evidence that the Respondents held TB certificates. If the decision was set aside (which it should be), it could be remade without a further hearing as the issues were narrow.

13. The tribunal reserved its decision which now follows. The tribunal accepts that Judge Clarke's finding that the First Respondent had indeed applied for and then been

refused leave to remain in 2018 has been vindicated. That, however, is not the end of the matter. Although Judge Clarke's decision was well-structured, the judge inadvertently fell or was led into material error when preparing the Article 8 ECHR balance sheet, as UTJ Pickup identified. This was an appeal based on an Article 8 ECHR claim outside the Immigration Rules, which means in short that the Respondents had to show disproportionality to be excused departure from the United Kingdom.

14. The issue of whether there were insurmountable obstacles to the continuation of family life in Nigeria was nowhere properly considered by the judge. That was unfortunate, as it was necessarily a significant element in the proportionality assessment. It was the undisputed fact that the entire family was Nigerian. The First Respondent and Mrs Ikpefua were married in Nigeria, from which it may reasonably be inferred that they have family there. It may also be reasonably be inferred that the First Respondent and Mrs Ikpefua were ordained as ministers in Nigeria. Mrs Ikpefua is not settled in the United Kingdom as she only has limited leave to remain. Neither of the children has leave to remain or has commenced formal education in the United Kingdom. In short, there was no evidence before the judge of any special hardship in the family's returning to Nigeria. That was left out of account.

15. It is not at all easy to see how the First Respondent's attempts to "regularise his stay" should or could be counted in his favour in the Article 8 ECHR balancing exercise. It was true that there was no evidence that the First Respondent had resorted to a false identity or had gone into hiding since becoming an overstayer, but the fact was that the First Respondent had breached immigration law by overstaying at length and had repeatedly refused to obey the Secretary of State for the Home Department's direction, which was that he had no basis of stay in the United Kingdom and so was required to leave. The plain inference is that Mrs Ikpefua was well aware of her husband's lack of leave to remain and precarious status. Their children were born while both their parents were aware that the family was not settled in the United Kingdom, and had no assurance of settlement.

16. The United Kingdom is not a police state and enforced removal is a distasteful process which is usually a last

resort. It is expected that visitors to the United Kingdom will obey the law. Immigration law is not a special category of law to which obedience is optional and voluntary. The First Respondent had no right (absent some dramatic change in circumstances which had not occurred) simply to ignore the refusal notices and, in his own good time, make yet another application. He had raised various family concerns as excuse for at least part of his overstay but those concerns did not prevent compliance with the law. Such conduct is plainly and obviously against the public interest, and so must weight the scales against the Respondents. The judge's decision to count the First Respondent's repeated out of time applications in his favour is plainly mistaken.

17. There were two further errors of law in the judge's decision. The judge's finding that there would be a delay of six months in obtaining entry clearance was not confirmed by the Home Office in the pre-hearing review, which stated the period as two weeks. It is unclear why the judge decided that there would be six months' delay.

18. It is also unclear why the judge found at [27] that the Respondents could obtain TB certificates from Nigeria. The fact was that no such TB certificates were in evidence. None was in the Respondents' bundle.

19. The tribunal accordingly finds that the judge's Article 8 ECHR evaluation was defective. His decision is set aside for material error of law.

20. As there was no real dispute of fact, the balance sheet can be redrawn and the decision can be remade without a further hearing. There was no need for further argument or submissions, all of which were recorded and are set out in Judge Clarke's decision.

21. The correct answer is clear. The Respondents are unable to meet the Immigration Rules. Article 8 ECHR does not provide a general remedial power to avoid compliance. Where the Respondents live as a family is a matter of personal choice, save that they cannot demand to live in the United Kingdom. The family can return to Nigeria and continue their family life there without facing any serious hardship, let alone insurmountable obstacles. All are nationals of Nigeria. The parents were born and educated there, and have worked there. The First Respondent has spent some five years in the United Kingdom as an overstayer and has

repeatedly refused to leave, despite having been informed he must do so. The best interests of the two children who have yet to commence formal education are to be with both parents. The public interest in immigration control requires that the First Respondent either leaves the United Kingdom and resumes his family life in Nigeria or that he leaves the United Kingdom and applies for entry clearance from Nigeria for himself and his daughter.

22. Whether the First Respondent's wife accompanies him to Nigeria with their children is a matter for her. She has chosen to remain in the United Kingdom with her husband despite his lack of leave. If she decides to remain in the United Kingdom while the Respondents seek entry clearance, she will do so in the knowledge that (a) the process is likely to take some time (two weeks according to the Home Office, up to six months according to the sources mentioned by Judge Clarke) and that she will have to wait and (b) a successful outcome is not assured. Any private inconvenience is proportionate to the strong public interest in immigration control.

DECISION

The appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is set aside with findings of fact preserved.

The decision and reasons is remade as follows:

The appeals are dismissed

No fee awards are made

Signed **Dated** 4 October 2023

R J Manuell
Deputy Upper Tribunal Judge Manuell