Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2023-003371
First-Tier Caser No: HU/56843/2022
IA/09803/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 9th May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MORONFOLU AJANI
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr N Garrod, Counsel
For the Respondent: Ms McKenzie, Home Office Presenting Officer

Heard at Field House on 25 March 2024

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 2 December 1987. He appeals against a decision of the Respondent dated 16 September 2022 to refuse him entry clearance as the spouse of Victoria Olubunmi Dario, a British national born on 13 May 1992 ("the sponsor") who has dual British and Nigerian nationality. The parties married on 18 August 2016 in Ibadan, Nigeria. The appellant made a number of applications to visit the United Kingdom before making an application on 3 March 2022 to join the sponsor as her spouse. It was the refusal of that application which has given rise to the present appeal.

The Explanation for Refusal

2. The application was refused by the respondent on the basis that the Appellant did not meet the financial requirements of section E-ECP.3.1. of Appendix FM of the Immigration Rules. These provide that an applicant must produce specified evidence, from the sources listed in paragraph E-ECP.3.2., of- (a) a specified gross annual income of at least- (i) £18,600. As the Sponsor had not been in her current employment for 6 months she had to show that she was currently employed and earning an annual salary of at least £18,600 and had earned at least £18,600 in the previous 12 months prior to the date of the application.

3. The Sponsor provided a letter from her employer Anchor Greenhive Care Home that showed she had an annual salary of £20,800.74. However, the four pay slips provided showed that she earned £18,572. The Sponsor did not meet the first requirement (she was short by £28). The Sponsor also failed to show she had earned £18,600 in the 12 months prior to her current employment. The Sponsor had submitted 4 pay slips showing she earned £6,191.00. She also submitted pay slips from another employer, St Mary's Nursing Home to show she earned £9,017.68. The evidence of income from both jobs was thus a total of £15,208.45 in the 12 months prior to the application, again short of the £18,600 requirement.

4. The respondent considered, under paragraphs GEN.3.1. and GEN.3.2. of Appendix FM as applicable, whether there were exceptional circumstances in the appellant's case which could or would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for the appellant or his family. Based on the information provided the respondent decided that there were no such exceptional circumstances in this case.

The Proceedings

5. The appellant's appeal was allowed at first instance by Judge of the First-tier Tribunal Khan sitting at Hatton Cross on 20 April 2023. The Respondent was granted permission to appeal that decision and the matter came before me on 22 September 2023 when I found a material error of law in the First-tier determination and set it aside. I directed that

the appeal be reheard in the Upper Tribunal and hence the matter came before me again on 25 March 2024. Exhibited to this determination is a copy of my error of law decision setting aside the decision of the First-tier. I gave permission in my decision to the appellant and the sponsor to file up-to-date witness statements if they so wished but no such further evidence was produced. I did have a skeleton argument dated 24 March 2024 prepared by counsel who appeared before me. I refer in more detail to the contents of that skeleton argument below, see [12] to [14].

The Hearing

6. The sponsor attended and gave oral evidence. She was cross examined by the presenting officer. She said that she could not live in Nigeria because her husband was unemployed there and would be unable to maintain her. Neither he nor she could obtain employment in Nigeria because there were no jobs available. She was employed as a healthcare assistant in the United Kingdom but would be unable to undertake that work in Nigeria because of the state of the Nigerian healthcare system. She had been working in the United Kingdom now for the last nine years. Her parents and two brothers were living in the United Kingdom. She had no family herself in Nigeria although her husband had his parents and one brother and one sister.

7. In cross-examination she said her husband who is now 37 was unable to find work because looking for a job in Nigeria was extremely difficult. The appellant had some qualifications, he had studied anatomy and qualified in 2007. The sponsor was asked twice in cross examination what work the appellant had done in the past seven and a half years (since the wedding) but did not answer the question saying instead that she had been sending the appellant money since the couple had married. If granted entry clearance however the appellant would look for work in this country. The appellant had applied for different jobs with various companies in Nigeria but the problem was that to obtain work one had to be well-connected and someone would have to help a person to get a job.

8. She herself had improved her communication skills working for a charity before she began working in the healthcare sector in the UK. She wanted to establish a family life in the United Kingdom with her husband because it would be easier to live here than in Nigeria and also because her family lived here. She had work here. The appellant lived with his parents but they were able only to give limited assistance to the appellant as they were retired and aged. She had been several times to Nigeria in the last 7 ½ years since the marriage. The last visit was in November 2023 when she stayed for three months.

9. In re-examination she confirmed that she wanted to have a child with her husband but it would be difficult if her husband was not allowed to come to the United Kingdom because it would be difficult for him to see the child. In answer to questions from me, the sponsor said that the first time the appellant had applied to come to the United Kingdom to see her was in

2017, a year after the marriage. She could not have applied earlier because she was not working at that time.

Closing Submissions

10. In closing, the respondent relied on both the refusal letter and the respondent's review dated 7 February 2023. Given that there was a genuine relationship between the sponsor and the appellant the tribunal had to look at whether there were exceptional circumstances and whether the refusal of this application resulted in unjustifiably harsh consequences for the couple. No exceptional circumstances had been advanced either in the witness statements of the couple or in the sponsor's evidence today. The sponsor had been given an opportunity during the hearing to explain what exceptional circumstances there were in this case but she had been unable to do so. The respondent's decision was not a disproportionate response to the appellant's application.

11. There was no objective material concerning the economic position in Nigeria and the difficulty or otherwise of obtaining work. It appeared from the sponsor's evidence that the appellant had made efforts to look for work, but difficulties in obtaining employment were not exceptional circumstances. Both the appellant and sponsor had various qualifications. The sponsor was asked in re-examination whether there would be problems raising a child but there was no child in existence at the present time. The sponsor herself had lived in Nigeria until the age of nine and she travelled back to Nigeria to see the appellant. Her family could always visit her in Nigeria if she went back. She had dual nationality. Referring to the case of **Agyarko [2017] UKSC 11**, the fact that the sponsor was British did not of itself make an exceptional case. The appellant wanted to come to the United Kingdom but that was a choice and the intention to have a family here was not enough to outweigh the public interest and the appeal should be dismissed.

12. In closing for the appellant reliance was placed by counsel on his skeleton argument. The important point in the case was the criteria that the application for entry clearance was tested against. Citing paragraph 60 of **Agyarko** the skeleton argument stated:

"It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test.

Exceptional circumstances were:

"circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate".

13. Precariousness did not apply in the instant case. Nor was there any allegation of criminality. The skeleton argument accepted that:

"*Article 8 did not impose a "general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country*"

Any interference in the couple's family life was not necessary, as the sole issue at its highest was simply timing. Even the Respondent did not claim that the appellant would be refused subject to making a new application and paying the relevant fee. Bearing in mind the length of the marriage, the interference in the couple's family life was not proportionate.

14. It was unreasonable and unjustifiably harsh to require the Appellant's wife to uproot her life as a British citizen and relocate to live in Nigeria or the United Arab Emirates (UAE) with the Appellant under these circumstances. I pause to note here that the reference to living in the UAE is because when making his application for entry clearance the appellant indicated that he had a permanent right to live in the UAE. The difficulties for the sponsor of uprooting her life were severe, given her home, work and life were all in the United Kingdom.

15. In oral submissions counsel argued that the factors set out in section 117B of the Nationality Immigration and Asylum Act 2002 were neutral in this case. Whilst marriage to a British citizen did not give the appellant an automatic right to come to the United Kingdom given the lack of criminality and no claim by the respondent of unsuitability the issue was simply proportionality and the reasonableness of the respondent's decision. Reasonableness was the test, see **MF (Nigeria) [2013] EWCA Civ 1192** .

16. Although the couple did not have any children the sponsor wanted to have children but there was a problem for the couple because it was not reasonable to expect a child to be brought up by parents who were living in different countries to each other. The child should be brought up in the United Kingdom. It would be difficult for both the appellant and the sponsor to find work in Nigeria. It was reasonable that the couple should live in one country together and more reasonable that they should live here in the United Kingdom rather than Nigeria. The sponsor's parents had attended court to support the application. The couple's preference for living in the United Kingdom should prevail rather than the preference by the court that they should live elsewhere. The family life of the sponsor would be interfered with by the respondent's decision and it remained questionable whether that decision was in accordance with the law. The sponsor was entitled to enjoy her rights as a citizen of the United Kingdom to live in this country.

17. What was stopping the appellant and sponsor living together was that the appellant's application had been made at the wrong time. What the issue

came down to was whether a new application was necessary rather than any indication that such an application would be unsuccessful. It was disproportionate to prevent the sponsor from living in the United Kingdom with her husband. The parties have been married for 7 ½ years and had maintained that relationship. It was a red herring that the sponsor had dual nationality. Making the appellant apply again for entry clearance was a revenue raising exercise by the respondent. The appeal should be allowed.

Discussion and Findings

18. The appellant's application for entry clearance as a spouse to join the sponsor was refused because the sponsor could not show at the date of application that she earned the necessary sums to be able to support herself and the appellant. Although it appears that the sponsor may now earn sufficient to satisfy the financial requirements of appendix FM the appellant has continued with this appeal relying on article 8 outside the immigration rules. The result of that is that the appellant must show that the respondent's decision to interfere wit the appellant and sponsor's family life results in unjustifiably harsh consequences. If there are such unjustifiably harsh consequences then the respondent's decision is disproportionate and the appellant's appeal should be allowed.

19. As the appeal is one under article 8 only I remind myself of the **Razgar [2004] UKHL 27** step-by-step structured approach to analysing article 8. The first step is to enquire whether there is a family life that will be interfered with. The appellant and sponsor are in a genuine relationship and have been married now for seven and a half years. The sponsor and appellant speak to each other over the telephone every day, I was told and the sponsor last visited the appellant in Nigeria in November 2023 staying for three months. The appellant and the sponsor thus have a family life capable of protection.

20. The respondent's decision is in accordance with the law and is in pursuit of a legitimate aim because the sponsor could not show that she had sufficient earnings at the time of the application for entry clearance. The immigration rules could not be satisfied. In my previous decision when considering whether the rules were complied with, the fact that the sponsor could show that she was earning enough money by the date of hearing is irrelevant. It took some time for the appeal to come on before the tribunal.

21. The appellant has not made a fresh application for entry clearance but is proceeding to rely on his previous application which was refused because the sponsor could not meet the financial requirements. The respondent's decision must therefore be in pursuit of a legitimate aim because of the

failure to show sufficient earnings. The respondent's decision interferes with the appellant and sponsor's family life because it prevents them from living together in the United Kingdom as they would wish. The respondent's decision does not alter the status quo which existed before the application was made since the parties were then and still are living apart.

22. If it was reasonable to expect the sponsor to relocate to Nigeria to live there with the appellant the respondent's decision would not interfere with family life so significantly such as to cause unjustifiably harsh consequences. The question as so often in article 8 cases is whether the interference in family life caused by the decision is proportionate to the legitimate aim pursued. The parties do not have the right to decide where to enjoy their family life as is conceded by the appellant in this appeal.

23. Does the decision cause unjustifiably harsh consequences? The sponsor has dual nationality. That is not an irrelevant factor in this case and I reject the submission to me by counsel for the appellant. The sponsor is a national of Nigeria and has visited the country and indeed spent several months there quite recently. She is familiar with the life and customs of that country. She has no difficulty entering the country or staying as long as she pleases.

24. The sponsor states that it would be difficult for her and the appellant to obtain work in Nigeria. I remind myself that the burden of proof in a case of this kind is on the appellant. He must show on the balance of probabilities that it is more likely than not that the decision of the respondent is disproportionate. There has however been a dearth of evidence on the economic situation in Nigeria or why the appellant has found it difficult to obtain work. The sponsor referred to the appellant making job applications but her evidence was vague about what efforts exactly the appellant had made. The respondent pointed out in submissions that there is no background evidence to support the sponsor's contention that it would be difficult for the appellant or sponsor to find work in Nigeria or that work can only be found through contacts. It is not at all clear therefore why the appellant is not working nor why he could not support the sponsor if she were to return to the country of which she is a national and is familiar with.

25. It was not argued by the respondent before me that it was reasonable to expect the appellant and sponsor to enjoy their married life in the UAE although I note that when the sponsor was asked in cross-examination what work the appellant had done during the 7 ½ years of their marriage the sponsor's evidence was vague and she made no mention of the appellant having worked in the UAE.

26. In order to assess the proportionality of the interference with the appellant and sponsor's family life it is useful to set matters out in a balance sheet format. For the appellant is the fact that the marriage is genuine and has lasted now for several years and that the parties can demonstrate that

there is continuing devotion between them. The sponsor has made her home in the United Kingdom and her life would be interfered with by requiring her to travel to Nigeria to live with the appellant as well as there being an effect on the couple's family life. The sponsor could maintain the appellant were entry clearance to be granted. The appellant and sponsor argue that the consequences for them both of the respondent's decision are unjustifiably harsh.

27. On the respondent's side of the balance sheet is the fact that the appellant could not at the relevant time bring himself within the immigration rules. Had he been able to do that his appeal may have succeeded under article 8, see **TZ Pakistan [2018] EWCA Civ 1109**. Following the authority of **Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39** the article 8 rights of both appellant and sponsor must be considered. Although the consequences for the sponsor if she were to relocate might be difficult for her given that she has a well-paid job working in the health care sector in the United Kingdom they would not necessarily be unjustifiably harsh. There are no relevant children in this case and it is highly speculative to argue that an appeal should be allowed on the basis that the couple might have children in the future. Article 8 has to be assessed at the date of hearing and at that date this couple do not have children.

28. If the sponsor had no experience of life in Nigeria it might in such circumstances be unjustifiably harsh to expect her to live there with the appellant. The appellant lived in Nigeria as a child until the age of 9 years, she speaks relevant languages and could, I find, adapt to life in Nigeria. She could be visited by her own family who also hold Nigerian citizenship. This is not a revenue raising exercise by the respondent (as I understand counsel's submission to me to be that it was such an exercise). The appellant could not bring himself within the immigration rules and the test therefore to be applied under article 8 in determining whether any interference with family or private life is proportionate is whether the consequences are unjustifiably harsh.

29. For the reasons which I have given it cannot be said that they are. This does not prevent the appellant from making a fresh application to the respondent for entry clearance and potentially showing that the rules could now be met. That is a matter for the appellant and his advisers. Given that the appellant cannot succeed under the immigration rules and is thus reliant on article 8 outside the rules and given that I find that there are no unjustifiably harsh consequences resulting from the respondent's decision I find that the appellant cannot succeed under article 8. I dismiss the appeal.

Notice of Decision

The Appellant's appeal against the respondent's decision is dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 26th day of March 2024

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

Since the appeal has been dismissed there can be no fee award made.

Signed this 26th day of March 2024

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2023-003371

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 22 September 2023	
Prepared on	.....

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MORONFOLU AJANI
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:

For the Appellant: Mr N Garrod, counsel
For the Respondent: Mr M Parvar, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a national of Nigeria born on 2 December 1987. He appealed against a decision of the Respondent dated 16 September 2022 to refuse his human rights claim. The appeal was allowed at first instance by Judge of the First-tier Tribunal Khan sitting at Hatton Cross on 20 April

2023. The Respondent was granted permission to appeal that decision and thus the matter comes before me in the first place as an appeal by the respondent. Nevertheless for the sake of clarity I shall continue to refer to the parties as they were known at first instance.

2. The appellant applied on 3 March 2022 to join his spouse Victoria Olubunmi Dario, a British national born on 13 May 1992 ("the sponsor"). The application was refused by the respondent on the basis that the Appellant did not meet the financial requirements of section E-ECP.3.1. of Appendix FM of the Immigration Rules. These provide that an applicant must produce specified evidence, from the sources listed in paragraph E-ECP.3.2., of- (a) a specified gross annual income of at least- (i) £18,600. As the Sponsor had not been in her current employment for 6 months she had to show that she was currently employed and earning an annual salary of at least £18,600 and had earned at least £18,600 in the previous 12 months prior to the date of the application (my emphasis).

3. The Sponsor provided a letter from her employer Anchor Greenhive Care Home that showed she had an annual salary of £20,800.74. However, the four pay slips provided showed that she earned £18,572. The Sponsor did not meet the first requirement (she was short by £28). The Sponsor also failed to show she had earned £18,600 in the 12 months prior to her current employment. The Sponsor had submitted 4 pay slips showing she earned £6,191.00. She also submitted pay slips from another employer, St Mary's Nursing Home to show she earned £9,017.68. The evidence of income from both jobs was thus a total of £15,208.45 in the 12 months prior to the application, again short of the £18,600 requirement.

The Decision at First Instance

4. More than twelve months elapsed from the date of application until the date of the hearing before judge Khan. During that time the sponsor had continued to work and as a result could now show that for the 12 months preceding the hearing at first instance she had earned more than the £18,600 requirement. The judge found that the requirements of the rules were met as at the date of the hearing before her (although not at the date of application). As a result she held that the refusal of entry clearance to the appellant was disproportionate under Article 8 and she allowed the appeal.

The Onward Appeal

5. The respondent appealed the judge's decision on two grounds. The first ground was that the judge had in effect used Article 8 as a general dispensing power when it was clear from the determination that the appellant could not satisfy the rules at the date of application which was the relevant date for what needed to be shown. The second ground was that the judge had given no or insufficient reasons why the decision of the respondent disproportionately interfered with the Article 8 rights of the appellant and the sponsor, since all the respondent's decision did was to

confirm the existing situation. In any event the appellant had a remedy which was to make a fresh application for entry clearance this time exhibiting sufficient wage slips of the sponsor to show that he could now satisfy the rules. Permission to appeal was granted by the First-tier on both grounds.

The Hearing Before Me

6. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

7. For the respondent it was argued that the judge had not properly considered whether specific evidence required by appendix FM-SE had in fact been provided. The judge should have found that the financial requirements were not met in this case because the appellant and sponsor could not show that the sponsor's salary reached the appropriate level. The judge had assessed the appeal outside the rules. There had been no consideration by the judge whether there were any exceptional circumstances or harsh consequences of refusing the appeal even though the absence of such consequences had been a point relied upon by the respondent. The respondent's decision simply maintained the status quo and the determination was not adequately reasoned. The decision of the judge was based on the assumption that the appellant could meet the rules. That was clearly a material error and the decision should be set aside.

8. For the appellant it was submitted that judge Khan was correct in law in her decision. It was within the range of decisions open to her. The respondent's grounds did not identify any error of law in this case. At the date of hearing the appellant met the rules. If an appellant had not met the rules at the date of application case law appeared to support the appellant and the judge's view in this regard, see paragraph 51 of **Agyarko: [2017] UKSC 11** where it was said: "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."*

9. Counsel argued that there was no point in taking the matter further if a person qualified, see **Chikwamba [2008] UKHL 40.** The respondent accepted that the appellant qualified at the date of hearing. The judge found the appellant did. The only point in issue in the case related to whether the financial requirement was met by the appellant. Counsel accepted that the appellant could not meet the financial requirements at the date of application. In the case of **TZ Pakistan [2018] EWCA Civ 1109** it was held that if the rules were met then the refusal would be a

breach of the article 8 rights of an appellant. The judge was entitled to find that the requirements of article 8 were met at the date of hearing. The evidential requirements in this case were also met. The bundle before the judge included a letter from the employer as well as the sponsor's contract of employment.

10. There was no reason why the appellant and the sponsor should need to go to the expense and delay in making a fresh application, a course of action suggested by the respondent in the grounds of onward appeal. The date of the application for entry clearance was a minor part of the assessment. It was wrong for the respondent to rely on the status quo as justification for refusing the appellant's application to join sponsor.

11. In conclusion for the respondent reference was again made to the issue of the specific evidence to be produced in support of an application. Once the rules were not met the appellant's case fell apart. In response to the appellant's submission regarding Chikwamba, reliance was placed upon the case of **Alam 2023 EWCA Civ 30** where at paragraph 110 the Court of Appeal stated:

> *Chikwamba* is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary. If there are other factors which tell against the article 8 claim, they must be given weight, and may make it proportionate to require an applicant to leave the United Kingdom and to apply for entry clearance. … if the application for leave to remain is not refused on that narrow procedural ground, a full analysis of all the features of the article 8 claim is always necessary.

The appellant's appeal against the respondent's decision should be dismissed outright.

12. Counsel for the appellant noted that the relevant documentation required by Appendix FM-SE had been in the appellant's bundle on the day of the hearing. If a material error of law was found and the determination set aside there would need to be a fact-finding issue for the tribunal in relation to the appellant's article 8 claim which might make it more suitable to be remitted back to be heard by the First-tier Tribunal.

Discussion and Findings

13. The facts in this case are relatively straightforward. The appellant and sponsor are in a genuine family relationship as husband and wife and the appellant, a citizen of Nigeria, wishes to join his wife the sponsor in this country. It appears that for the purposes of the rules the appellant made his application somewhat too early as he applied for entry clearance as a time when the sponsor had not been able to earn the necessary amount of money to satisfy the requirements of appendix FM. Had the appellant

waited, some months he might have been able to satisfy the requirements and he would presumably by now be in this country. However he did not wait and because he could not satisfy the financial requirements at the date of application his application was refused by the respondent.

14. He appealed and as I have indicated the appeal came on for hearing over twelve months after the date of application. By that time sponsor had established a sufficient work history to show that she could meet the necessary financial requirements. Although there is no right of appeal as such from a refusal under the rules, it has been held in cases such as **TZ** that if the requirements of the rules can be shown then the decision to refuse is unlawful under the provisions of article 8 since the decision under appeal no longer serves a legitimate purpose. That however is different to saying that a situation where an applicant does not meet the rules at the relevant time can be remedied by relying on article 8 unless there are sufficient grounds to allow an article 8 appeal in its own right.

15. It is not clear from the determination in this case whether there are any such grounds since the judge did not deal with that aspect of the matter. She confined her attention to whether the appellant could satisfy the rules by the date of the hearing. That was an error since the rules stated that the requirements had to be satisfied at the date of application. Following on from the refusal the ability of the appellant to satisfy the rules at a later date, fell away. It could not be revived since to do so would be in effect to rewrite the requirements of the rules and this tribunal is not in position to do this. Thus I agree with the respondent's submission that what the judge in effect was doing in this case was using article 8 as a general dispensing power to overcome the difficulty which the appellant was in as a result of applying before the application was properly ready. As the Supreme Court said in **Patel and others [2013] UKSC 72 "**It is important to remember that article 8 is not a general dispensing power".

16. Whilst I can understand and sympathise with the desire of the appellant to resume family life with the sponsor as soon as possible that of itself is insufficient to allow the appeal to be allowed under either the rules or article 8. Nor do I accept the argument put forward on the appellant's behalf that this is a case to which the principal in **Chikwamba** could apply. As the Court of Appeal pointed out in **Alam**, the case of **Chikwamba** is confined to those cases where the only reason for rejecting the application for leave to remain is the requirement that the application should be made outside the United Kingdom. Such a requirement could not be relevant in a case such as this where the appellant is already outside the United Kingdom and where he had been refused on financial grounds. It is not a bureaucratic formality that the appellant should be obliged to meet the requirements of the rules at the date of application.

17. It has been said that: "When a tribunal goes on to consider an article 8 claim outside of the Rules (as it will do where article 8 is engaged, see *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 at [80]), it will factor into

its evaluation of whether there are exceptional circumstances both the findings of fact that have been made and the evaluation of whether or not there are insurmountable obstacles – that being a relevant factor both as a matter of policy and on the facts of the case to the question of exceptional circumstances."

18. For the appellant in this case to succeed outside the rules he would need to show that the consequences of the respondent's decision are such that the appeal should be allowed under article 8 in its own right, for example that the consequences of the respondent's decision was harsh or there were insurmountable obstacles to the sponsor's relocation or some other appropriate requirement was met. The judge did not deal with this aspect of the case. I find that there is a material error of law in the judge's decision to allow the appeal under article 8 on the basis that the factual matrix had changed and that the respondent's decision was no longer lawful because it infringed article 8 rights, since the relevant date to comply with the rules remained the date of application. I therefore set the decision aside.

19. It was urged on me that if I should set the First-tier decision aside I should remit the appeal back to the First-tier for a fact-finding enquiry to be undertaken in relation to the appellant's article 8 claim in more detail. I do not consider that necessary. The facts of this case are relatively straightforward. The appellant and sponsor do not have the right to choose where to enjoy their family life together, they need to explain why for example they cannot continue their family life in Nigeria, what are the insurmountable obstacles to this and what the consequences for the appellant and sponsor would be if the status quo (with the parties being separated) were to be continued.

20. I therefore order that the decision of the First-tier Tribunal having been set aside the decision will be remade in the Upper Tribunal at the earliest available date. Both the appellant and sponsor can file up to date statement if they so wish setting out their article 8 claims and the sponsor should be available to attend the resumed hearing to be questioned. The respondent suggested in the grounds of appeal that the appellant could make a fresh application. This would involve the appellant withdrawing the present appeal, that is a matter for the appellant and his advisers.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. The decision on the appeal in this case will be made at a resumed hearing on the first available date, time estimate 1.5 hours.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 25th day of September 2023

……

Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

Since the appeal has been dismissed there can be no fee award made.

Signed this 25th day of September 2023

.....
Judge Woodcraft
Deputy Upper Tribunal Judge